

NO. 7829

*Vol 1865*

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United States  
Circuit Court of Appeals

For the Ninth Circuit

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ANTONIO ROCCHIA,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

*San Francisco Law Library.*

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Transcript of Record

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Upon Appeal from the United States District Court  
for the Northern District of California,  
Southern Division.

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FILED

APR 27 1935

PAUL F. O'BRIEN,  
CLERK



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In the Southern Division of the United States Dis-  
trict Court, Northern District of California

No. 24941-L

UNITED STATES OF AMERICA

vs.

ANTONIO ROCCHIA

NAMES AND ADDRESSES OF COUNSEL:

Attorneys for Appellant, Antonio Rocchia:

GEORGE J. HATFIELD, Esq.,

FRANK J. PERRY, Esq.,

333 Montgomery St.,

San Francisco, Calif.

Attorneys for Appellee, the United States:

H. H. McPike, Esq.,

United States Attorney,

THOS. G. GOULDEN, Esq.,

Asst. U. S. Attorney,

San Francisco, Calif.

(NO) 24941-L

In the Southern Division of the United States District Court for the Northern District of California.

In the November 1933 term of said Division of said District Court, the Grand Jurors thereof, upon their oaths present:

(R. S. 3258) THAT

FRANK FERRARI, SILVIO CAPPI  
AND ANTONIO ROCCHIA

(hereinafter called the defendants), on the 9th day of January, 1933 at a place known as 60 Brady Street, in the City and County of San Francisco, within said Southern Division, knowingly had in their possession and custody and under their control for the distillation of alcohol a still and distilling apparatus set up, without having registered the same in the manner prescribed by Section 3258 of the Revised Statutes of the United States.

SECOND COUNT: (R. S. 3259)

And the said Grand Jurors, upon their oath, do further present: That on the said day at the said place the said defendants were engaged in the business of a distiller of alcohol, and then and there wilfully failed to give the notice prescribed by Section 3259 of the Revised Statutes.

THIRD COUNT: (R. S. 3260)

And the said Grand Jurors, upon their said oaths, do further present: That on the said day at the

said place, the said defendants having then and there commenced the business of a distiller of alcohol, wilfully failed to give the bond prescribed by Section 3260 of the Revised Statutes of the United States.

FOURTH COUNT: (R. S. 3281)

And the said Grand Jurors, upon their said oaths, do further present: That on the said day at the said place, the [1\*] said defendants wilfully engaged in and carried on the business of a distiller of alcohol, with intent to defraud the United States of the tax on the spirits distilled by them.

FIFTH COUNT (R. S. 3282)

And the said Grand Jurors, upon their said oaths do further present: That on the said day in a building and on premises at the said place the said defendants knowingly made and fermented mash, wort and wash, fit for distillation and for the production of alcohol, other than in a distillery duly authorized according to law.

SIXTH COUNT: (R. S. 3282)

And the said Grand Jurors upon their oaths do further present: That on the said day at the said place the said defendants, not then or there being an authorized distiller, knowingly separated by distillation the alcoholic spirits from fermented mash, wort and wash.

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\*Page numbering appearing at the foot of page of original certified Transcript of Record.

## SEVENTH COUNT: Conspiracy (37 CCUS)

And the said Grand Jurors upon their oaths aforesaid, do further present: That said defendants on or about the first day of August, 1932, the exact time and place being to said Grand Jurors unknown, and at all times thereafter up to and including on or about the first day of February, 1933, did, within the Southern Division of the Northern District of California, wilfully, unlawfully, knowingly and feloniously combine, confederate, conspire and agree together and with each other, and with divers other persons whose names are to the Grand Jurors unknown, to unlawfully have in their possession a still and to operate a distillery in violation of the Internal Revenue laws of the United States, and to manufacture, possess and sell intoxicating liquor in violation of the National Prohibition Act, and that thereafter, during the existence of that conspiracy, and to effect the object there- [2] of, the defendant Antonio Rocchia did the following overt acts at the times and in the manner hereinafter alleged:

(1) That on or about the 8th day of November, 1932, the defendant Antonio Rocchia visited the realty firm of Sam McKee & Company, 2812 Mission Street, in the City and County of San Francisco, State of California, and negotiated for a lease of the premises located at No. 60 Brady Street, in the City and County of San Francisco, State of California;



(2) That on or about the 8th day of November, 1932, the defendant Antonio Rocchia in company with an employee of the realty firm of Sam McKee & Company visited those certain premises located at No. 60 Brady Street, San Francisco, California;

(3) That on or about the 10th day of November, 1932, the defendant Antonio Rocchia executed, under the name of Joseph Rossi, lessor, a lease in writing for the premises at No. 60 Brady Street, City and County of San Francisco, State of California, for the period of one year, with the owner, A. L. Thulin, in the presence of a representative of Sam McKee & Company, and paid the sum of \$450; \$150 of which being the first month's rent, and the balance being security for last two months rental, under the terms of said lease.

H. H. McPIKE

United States Attorney.

Approved as to form:

R.B.McM.

[Endorsed]: A true bill, Edw. Landis, Foreman

PRESENTED & ORDERED FILED IN OPEN  
COURT THIS 14th DAY OF NOVEMBER, A. D.  
1933.

WALTER B. MALING, Clerk

By Harry L. Fouts,

Deputy Clerk. [3]

[Title of Court and Cause.]

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Saturday the 9th day of December, in the year of our Lord one thousand nine hundred and thirty-three.

PRESENT: the Honorable HAROLD LOUDERBACK, District Judge.

NO. 24941-L

UNITED STATES OF AMERICA,

vs.

ANTONIO ROCCHIA

This case came on regularly for arraignment of defendant, Antonio Rocchia, who was present with his Attorney, Francis J. Perry, Esq., Wm. E. Licking, Esq., Asst. U. S. Atty., was present for and on behalf of United States. Said defendant was duly arraigned and thereupon, by consent, it is ordered that this case be and same is hereby continued to Dec. 23, 1933 at 9:30 A.M. for entry of plea of said defendant. [4]

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[Title of Court and Cause.]

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San

Francisco, on Saturday the 10th day of February, in the year of our Lord one thousand nine hundred and thirty-four.

PRESENT: the Honorable A. F. ST. SURE, District Judge, sitting for and on behalf of Honorable HAROLD LOUDERBACK, District Judge.

NO. 24941.

UNITED STATES OF AMERICA

vs.

ANTONIO ROCCHIA

In this case defendant Antonio Rocchia plead "Not Guilty". Ordered case set for trial on March 23, 1934. [5]

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[Title of Court and Cause.]

WE, THE JURY, find as to the defendant at the bar, as follows:

|          |           |
|----------|-----------|
| Guilty   | 1st Count |
| Guilty   | 2d Count  |
| Guilty   | 3d Count  |
| Guilty   | 4th Count |
| Guilty   | 5th Count |
| Guilty   | 6th Count |
| Disagree | 7th Count |

M. E. FIBUSH.

Foreman

[Endorsed]: Filed Jun 27, 1934 at 6 o'clock and 50 Minutes P.M. [6]

[Title of Court and Cause.]

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 27th day of June, in the year of our Lord one thousand nine hundred and thirty-four.

PRESENT: the Honorable HAROLD LOUDERBACK, District Judge.

NO. 24941-L

UNITED STATES OF AMERICA,

vs.

ANTONIO ROCCHIA

NO. 25112-L

UNITED STATES OF AMERICA,

vs.

ANTONIO ROCCHIA

The defendant, Attorneys for both parties, and the Jury heretofore impaneled being present, the trial of this case was resumed. John M. Burt and Wm. P. Goggin, were recalled, Sam McKee, Ray F. Love, Axel L. Thulin, Harold von Husen, Ernest E. Williams, Emil J. Canepa, Geo. W. Poultney, Thomas J. Church and Edward O. Heinrich were sworn and all were examined upon behalf of the United States, and the Government introduced into evidence its exhibits marked No. 9, 10, 11, 12, 13 and 14; and the Government rested. The defendant rested. Francis J. Perry, Esq., Attorney for the

defendant, made a motion for a directed verdict on behalf of the said defendant as to each of the two Indictments herein, which said motions were submitted and ordered denied. After argument by Attorneys for both parties and the instructions of the Court to the Jury, the Jury retired at 3:40 p. m., to deliberate upon their verdict. At 5:40 p. m., the Jury returned into Court for further instructions and again retired at 5:45 p. m. At 6:50 p. m., the Jury returned into Court and upon being asked if they had agreed upon a verdict, answered that it had as to case No. 24941-L [7] which said verdict was presented to the Court and ordered read and recorded, as follows: "We, the Jury, find as to the defendant at the bar as follows: Guilty, 1st Count; Guilty, 2nd Count; Guilty, 3rd Count; Guilty, 4th Count; Guilty, 5th Count; Guilty, 6th Count. Martin E. Fibush, Foreman," Upon being asked, the Jurors further stated they had been unable to agree upon a verdict as to the seventh count of said Indictment, and that they had been unable to agree upon a verdict upon the Indictment No. 25112-L. By consent of both parties, it is ordered that a finding be entered that the Jury had been unable to agree upon said seventh count and the said Indictment numbered 25112-L.

Further ordered, by consent, that Judgment of the defendant Antonio Rocchia be continued to 9:30 a. m., June 30, 1934. Further ordered that the Jurors herein be and they are hereby discharged and excused until 10 a. m, July 2, 1934. Further ordered that the defendant be remanded into the custody of the U. S. Marshal and that a Mittimus issue therefor. [8]

In the Southern Division of the United States District Court for the Northern District of California. First Division.

NO. 24941-L

Conv. Viol. R. S. 3258, 3259, 3260, 3281 and 3282  
(Internal Rev. Still Sections)

THE UNITED STATES OF AMERICA,

vs.

ANTONIO ROCCHIA

### JUDGMENT ON VERDICT OF GUILTY

Thomas Goulden, Assistant United States Attorney, and the defendant with his counsel came into Court. The defendant was duly informed by the Court of the nature of the Indictment filed on the 14th day of November, 1933, charging him with the crime of violating R. S. 3258, 3259, 3260, 3281 and 3282 (Internal Rev. Still Sections); of his arraignment and plea of Not Guilty; of his trial and the verdict of the Jury on the 30th day of June, 1934, to-wit:

“We, the Jury, find as to the defendant at the bar, as follows:

Guilty 1st Count; Guilty 2d Count; Guilty 3d Count, Guilty 4th Count; Guilty 5th Count; Guilty 6th Count; Disagree 7th Count.

Martin E. Fibush,  
Foreman”

The defendant was then asked if he had any legal cause to show why judgment should not be entered



herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a Motion for New Trial and a Motion in Arrest of Judgment; thereupon the Court rendered its Judgment; THAT, WHEREAS, the said ANTONIO ROCCHIA having been duly convicted in this Court of the crime of violating R. S. 3258, 3259, 3260, 3281 and 3282 (Internal Rev. Still Sections);

IT IS THEREFORE ORDERED AND ADJUDGED that the said ANTONIO ROCCHIA be imprisoned for the period of EIGHTEEN (18) MONTHS and pay a fine in the sum of ONE HUNDRED (\$100.00) DOLLARS and a penalty of FIVE HUNDRED (\$500.00) DOLLARS as to 1st Count; pay a fine in the sum of ONE HUNDRED (100.00) DOLLARS and a penalty of ONE THOUSAND (\$1000.00) DOLLARS as to 2nd Count; be imprisoned for the period of EIGHTEEN (18) MONTHS and pay a fine in the sum of FIVE HUNDRED (\$500.00) DOLLARS as to 3rd Count; be imprisoned for the period of EIGHTEEN (18) MONTHS and pay a fine in the sum of ONE HUNDRED (\$100.00) DOLLARS as to 4th Count; be imprisoned for the period of EIGHTEEN (18) MONTHS and pay a fine in the sum of [9] FIVE HUNDRED (\$500.00) DOLLARS as to 5th Count; be imprisoned for the period of EIGHTEEN (18) MONTHS and pay a fine in the sum of FIVE HUNDRED (\$500.00) DOLLARS as to 6th Count. Said place of imprisonment to be in a U. S. Penitentiary to be designated by the Attorney General of the United States.

Further ordered terms of imprisonment to run *concurrnclty*. Further ordered that in default of the payment of said fines said defendant be further imprisoned in the United States Penitentiary until said fines be paid or until he be otherwise discharged in due course of law.

JUDGMENT entered this 30th day of June, A. D. 1934.

WALTER B. MALING, Clerk  
By C. W. Calbreath  
Deputy Clerk.

[Endorsed] : Entered in Vol 29 Judg. and Decrees at page 351. [10]

---

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the HONORABLE HAROLD LOUDERBACK,  
Judge of the District Court aforesaid:

Comes now the defendant, Antonio Rocchia, by his attorney and respectfully shows that on the 27th day of June, 1934, the duly impaneled jury in the above-entitled court found a verdict of guilty on six counts of the Indictment herein against the defendant; that on the 30th day of June, 1934, judgment was pronounced and entered in said cause against this defendant wherein and whereby it was adjudged that the defendant Antonio Rocchia, on the first count of said indictment, be confined in a Federal Penitentiary for eighteen months and pay a fine of \$100 and a penalty of \$500; on the second



count, a fine of \$100 and a penalty of \$1000; on the third count, a fine of \$500 and confinement in the Federal penitentiary for eighteen months; on the fourth count, a fine of \$100 and confinement in the Federal penitentiary for the term of eighteen months; on the fifth count a fine of \$500 and confinement in the Federal penitentiary for eighteen months; on the sixth count, a fine of \$500 and confinement in the Federal penitentiary for eighteen months, the penitentiary sentences to run concurrently so that it will all amount to an imprisonment for eighteen months.

## II.

That on said judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which are more in detail set forth in the Assignment of Errors which is filed herewith. [11]

## III.

This petitioner, said defendant, feeling himself aggrieved by said verdict and judgment entered therein as aforesaid, hereby *peitions* this Honorable Court for an Order allowing him to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of said court in such cases made and provided, your petitioner having submitted and filed his bond on appeal as provided by statute and as heretofore fixed by the Court herein.

WHEREFORE, the defendant prays an order allowing an appeal in his behalf to the said United States Circuit Court of Appeals aforesaid, sitting at San Francisco in said Circuit, for the correction of errors so complained of, and that a transcript of the records, proceedings and papers in said cause be duly authenticated, and that further proceedings be stayed until the determination of such appeal by the said Circuit Court of Appeals.

GEO. J. HATFIELD  
FRANK J. PERRY  
Attorney for Defendant.

[Endorsed]: Service and receipt of copy of within hereby admitted this 7th day of July, 1934.

H. H. McPIKE  
U. S. Atty.  
By R. B. McMILLAN  
Asst. U. S. Atty.

[Endorsed]: Filed Jul 9, 1934 3:01 P. M. [12]

---

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

ORDERED, that the PETITION FOR APPEAL by the defendant in the above entitled action, is granted and appeal allowed; cost bond fixed at \$250.00; and

IT IS FURTHER ORDERED, that the defendant Antonio Rocchia be admitted to bail pending the hearing of said appeal, in the sum of \$10,000.00,

and that execution of the judgment of imprisonment be superseded and stayed, pending the determination of said appeal, upon the giving of said bail.

Dated: San Francisco, the 3rd day of July, 1934.

HAROLD LOUDERBACK

United States District Judge.

[Endorsed]: Filed Jul 9, 1934 3:01 P. M. [13]

---

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

ANTONIO ROCCHIA, defendant in the above entitled cause, in support of his petition for appeal herein, submits the following assignments of error as basis for reversal of judgment and sentence imposed upon him in the above entitled court on the 30th day of June 1934, in the above entitled cause.

A.

The court erred in denying the amended plea in abatement and motion to suppress evidence filed in behalf of defendant, Antonio Rocchia, on February 2, 1934 as a result of an unlawful search in violation of the rights guaranteed to him by the Constitution of the United States, which were made prior to said case being called for trial and which motion was renewed at said trial before the introduction of testimony, and denied thereafter during said trial, and exception taken at the time, said motion being included in the grounds of the mo-

tion by the defendant for a directed verdict of not guilty at the close of the testimony taken at said trial upon the ground that the search of said premises at 60 Brady Street and the subsequent seizure of articles therein [14] and all knowledge derived from said search and seizure was in violation of the rights guaranteed to the defendant by the Constitution of the United States, to the introduction of which testimony objection was timely made and exception taken. Said motion to suppress evidence will more fully appear in and is made part of defendant's bill of exceptions herein.

### I.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

AGENT DE KALB testified as follows:

“MR. GOULDEN: Q Then what did you do?  
A Investigator Goggin opened the door—

“MR. PERRY: Just a moment. I am going to object, your Honor, to any further testimony as to what happened after the agents looked into the building, upon the ground that it violates the Fourth and Fifth Amendments to the Constitution of the United States.

“MR. GOULDEN: This matter of search has all been disposed of and it is too late at this time to make any mention of the legality or illegality of the search.

“MR. PERRY: For the purpose of the record I am renewing my objection.

“THE COURT: Q What did you observe before you went in there? “A We detected the odor of fermenting mash and distillation, which is distinctly different. We heard the sound of the burner in the plant. We could see a *partition* dividing the building crosswise; in front of this *partition* was a pile of cartons; there was a pair of large tire tracks which went from the front [15] door and disappeared directly under this pile of cartons.

“Q Did you hear any other sound? A Other than the sound of the motors and burners, no, sir.

“Q You did not hear anything that indicated that anybody was in there? A The sound of the motors and burners in operation.

“Q You didn't see anything that indicated to you that anybody was in there; you heard no rattling of cans, did you? A No, sir.

“Q No people moving about? A No, sir; the other noise was so great that you could not hear anything else.

“Q Was the door open? A It was open about an inch. It was a door that opened in three sections. It was not jammed all the way shut.

“THE COURT: The objection will be overruled.

“MR. PERRY: Exception.”

## II.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

AGENT DE KALB

“WITNESS (Continuing): Inspectors Burt and Goggin entered the premises with me. We went through the first room and took a door to the left. I may say that the partition which went crosswise of the building was——

“MR. PERRY: Just a moment. I am going to object to the testimony as to anything inside the building, as far as the partition goes, upon the ground that it violates the Fourth and Fifth Amendments to the Constitution so far as this defendant is concerned.

“THE COURT: The same ruling.

“MR. PERRY: Exception. [16]

## III.

The Court in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

AGENT DE KALB (Continuing)

“I identify this plan that I am now shown as a diagram of the floor plan of the building at 60 Brady Street at the time the distillery was in it. I prepared that diagram, myself. I can mark the door we went through with the figure ‘1’ and then



proceed and enumerate the various doors we went through.

“MR. PERRY: I am going to object to any testimony the witness might give, either with respect to the diagram he has in his hand or to what he did when he went inside the still room, upon the ground that it violates the defendant’s constitutional rights, particularly as respects the Fourth and Fifth Amendments.

“THE COURT: Objection overruled.

“MR. PERRY: Exception.”

“WITNESS (Continuing): This is a correct diagram to the best of my recollection of the premises. It is not to scale but it indicates absolutely the general floor plan. I have marked the doors 1, 2, and 3; 1 being the first door through which we entered, 2 being the second door, and 3 being the third door. The second door is the door that leads into the room immediately to the left of the garage door as we enter. We then proceeded through a door in the back wall there and that permitted us to enter the still room proper. That door that I refer to is marked Door 3. [17]

#### IV.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

“MR. GOULDEN: Q What did you find in the still room as shown on the diagram there? (Government’s exhibit No. 1 in evidence)

“MR. PERRY: I object to the witness testifying to anything he found in the still room upon the ground that it violates the defendant’s constitutional rights, particularly with respect to the Fourth and Fifth Amendments to the Constitution.

“THE COURT: The same ruling.

“MR. PERRY: Exception.

“WITNESS (Continuing): We found a distillery that was producing between 500 and 1000 gallons of alcohol a day. There were some 30,000 gallons of corn sugar mash, a 500-gallon still, and a 250-gallon still, and over 1000 gallons of alcohol and whiskey. The man who was in charge of the premises at that time we arrested; he gave the name of Ferrari. We entered there about 4:30 o’clock in the afternoon. We arrested him immediately and we questioned him and we searched him.”

## V.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

“MR. GOULDEN: Q What did you find when you searched the defendant Ferrari?

“MR. PERRY: I make the same objection that I just previously made for the purpose of the record, your Honor. Will there be the same ruling? I will make the objection this way, [18] your Honor; I object to any statements to be given by this witness with respect to the last question propounded to him on the ground that it violates the



defendant's constitutional rights, particularly with respect to the Fourth and Fifth Amendments to the Constitution.

“THE COURT: Q You arrested the defendant right there? A Yes.

“Q Right in the still house? A Yes; this was Frank Ferrari.

“THE COURT: The objection will be overruled.

“MR. PERRY: Exception.”

“WITNESS (Continuing) We found on his person a key which fitted the *frong* door to the building. (U. S. Exhibit No. 2 for identification and later as Government's Exhibit No. 4 in evidence).”

## VI.

The Court erred in admitting documentary evidence, over the objection of the defendant as will more fully appear as follows:

“MR. GOULDEN: May I introduce the diagram in evidence, your Honor, as Government's Exhibit next in order?

“MR. PERRY: We object to the document being received in evidence upon the ground that it violates the defendant's constitutional rights, particularly as respects the Fourth and Fifth amendments.

“THE COURT: Objection overruled. It will be received as Government's Exhibit 1.

“MR. PERRY: Exception.” [19]

## VII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

AGENT DE KALB TESTIFIED AS FOLLOWS:

“Investigators Burt and Goggin returned to the still room about six o’clock and at that time they had in their custody another man who when questioned gave the name of Silvio Cappi. This man was searched and questioned. He had in his possession a key which was a duplicate of the key which was in the possession of Ferrari.

“MR. GOULDEN. Q I show you what purports to be a key (taken from the person of the defendant Cappi and marked U. S. Exhibit No. 3 for identification and later as No. 5 in evidence) and ask you if you have ever seen it before.

“MR. PERRY: I object to any testimony in respect to it upon the grounds heretofore urged, it violates the Fourth and Fifth Amendments to the Constitution so far as the constitutional rights of the defendant Rocchia are concerned.

“THE COURT: The objection will be overruled.

“MR. PERRY: Exception.

“WITNESS (Continuing); This key I can come more nearly saying it is the same key, because at the time the key was in my possession I noticed the fact that it was a duplicate, it had been made

by S. Orioli; however, I cannot say absolutely that that is exactly the same key taken off his person.”

## VIII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear [20] as follows:

AGENT DE KALB (Continuing) “At about ten o’clock in the evening Inspector Goggin and myself returned to the still building. At that time Investigator Burt was in the still room and had in his custody this defendant, Antonio Rocchia. At that time Investigator Goggin and Investigator Burt, the defendant Antonio Rocchia and myself were the only ones present in the building.

“MR. GOULDEN: Q What transpired next?  
“A Investigator Goggin made the remark——

“MR. PERRY: Just a moment. I am going to object to anything that may have transpired at this time upon the ground that it violates the constitutional rights of the defendant Antonio Rocchia, particularly as respects the Fourth and Fifth Amendments to the Constitution.

“THE COURT: Q This was in the presence of the defendant on trial? A Yes.

“THE COURT: The objection will be overruled.

“MR. PERRY: Exception.”

## IX.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

“WITNESS (Continuing) Investigator Goggin and I, as I recall it, stated to Investigator Burt, ‘It looks like you have got the big shot.’ Investigator Burt said, ‘I have,’ or something to that effect. Investigator Burt said, ‘Search him and see what you find.’ The defendant Rocchia did not make any comments at this time, he stood mute. [21]

“MR. GOULDEN: Q What did you do?

“MR. PERRY: I object to anything this witness may have done in that respect, on the ground that it violates the constitutional rights of the defendant on trial, particularly with respect to the Fourth and Fifth Amendments.

“THE COURT: Q He was under arrest at the time, was he not? A Yes.

“THE COURT: The objection will be overruled.

“MR. PERRY: Exception.

“WITNESS (Continuing) I searched the defendant and *fund* in his inside coat pocket a long wallet in which there was a quantity of money. I counted this money and there was \$1600, in currency. I counted this money on the floor. Inspector Goggin found in the defendant’s pocket another key which matched the two keys he had already taken from the other two defendants. In-

investigator Goggin found that key in the coat pocket of Rocchia. We compared the three keys. I satisfied myself that that key was a key similar to those that have been presented here for identification as Government's Exhibits 2 and 3, the other two keys."

### X.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows: [22]

"In the presence of the defendant Investigator Goggin asked Investigator Burt if the defendant had not offered him the money for the purpose of securing his liberty, and Investigator Burt stated that he had, and humorously stated that it was a very tempting offer. The defendant did not say anything at that time.

"MR. PERRY: If your Honor please, I wish to make an objection to that particular item of testimony just given upon the ground that it violates the defendant's constitutional rights, particularly as respects the Fourth and Fifth Amendments.

"THE COURT: Objection overruled.

"MR. PERRY: Exception."

### XI.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

"MR. GOULDEN: Q Was anything further found on the person of Rocchia?"

“MR. PERRY: The same objection to that, your Honor.

“THE COURT: The objection will be overruled.

“MR. PERRY: Exception.

“A Investigator Burt displayed some papers which he had already taken from the defendant and stated that he found them on the defendant’s person.”

## XII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

“MR. GOULDEN: Q Did you see these papers? A Yes.

“Q Did you examine them? A Yes.

“Q In a general way, what were these papers? [23]

“MR. PERRY: I object to any testimony by this witness, testifying in a general way, or in any way, with respect to the papers, upon the ground, first, that the original papers, themselves, are the best evidence; upon the second ground that it violates the constitutional rights of the defendant, particularly as respects the Fourth and Fifth Amendments to the Constitution; upon the third ground——

“THE COURT: What is the situation regarding these papers?

“MR. PERRY: Upon the third ground that an order of the Court has already been made directing



the return of the papers to the defendant. I wish at the same time, as part of the objection, to offer in evidence the record before the United States Commissioner, his docket No. 3142, and particularly the documents—the complaint filed before the Commissioner, the order of Judge Kerrigan directing the return of certain documents, and the bond of the defendant on trial.

“MR. GOULDEN: I don’t see the relevancy of this offer. There is nothing here that has any connection with this case. There is nothing to show any ruling was made on the so-called petition for exclusion. On that ground I object to it as entirely immaterial, irrelevant, and incompetent.

“MR. PERRY: In that particular respect I wish to say that the matter was presented to the United States Commissioner, a motion to suppress was filed before the United States Commissioner, and the case was dismissed as to the defendant Rocchia on trial here.

“THE COURT: Where is the petition upon which this is predicated?

“MR. PERRY: There is a petition for the exclusion of evidence and the notice of motion.

“THE COURT: I want the petition in No. 3142.

“MR. PERRY: This is it, your Honor. I will make it part of [24] the same record. So there will be no confusion in the record, your Honor, I wish to say that the case that was pending before

the United States Commissioner was dismissed as to the defendant Rocchia.

“THE COURT: Let me ask counsel for the Government, are you intending to put in evidence any property which was returned by this Court to the defendant?

“MR. GOULDEN: I intend to put in evidence, your Honor, exact photographs of these documents. The documents are in the possession of the defendant by an order of the Court. Under the well-known rules of evidence, where the evidence is in the particular and the peculiar custody of the other side, secondary evidence is permissible.

“THE COURT: That is not my point. Is this property which was covered by the order of Judge Kerrigan requiring its return to this defendant, are you contemplating offering that? Are you going to make any collateral attack on that order?

“MR. GOULDEN: I don't know whether that order is subject to collateral attack at the present time, or not. It reads that a motion to suppress has been granted. Undoubtedly that was the reason for the court signing the order. The fact is that no motion to suppress had been granted. I have the word of the Commissioner, himself, on that, and he has filed an affidavit.

“MR. PERRY: Counsel is giving testimony now, your Honor. The question your Honor asked counsel was whether or not any of the documents that were ordered returned by Judge Kerrigan were to be used on this trial. I understood that was the question your Honor asked counsel.



THE COURT: Of course, I think that the whole situation comes down to this, that the Court is to pass upon the legality of the arrest of this defendant, and that has not been presented [25] to the Court as yet.

“MR. GOULDEN: That has been presented to your Honor so far as the search and seizure were concerned. *Thaa* has been presented to and passed upon by your Honor.

“THE COURT: I do not at this time recall the facts.

“MR. GOULDEN: It was submitted to your Honor both on oral arguments and on briefs.

“THE COURT: I think you should produce the circumstances of his arrest here, just how it occurred. I do not recall those circumstances. This order is predicated on the supposed action of the Commissioner.

“MR. GOULDEN: Yes. The Commissioner has filed an affidavit telling exactly what happened. He will testify, if required.

“THE COURT: You expect to produce that testimony before the trial is over?

“MR. GOULDEN: Yes. I could not anticipate whether it was going to be necessary, or not.

“THE COURT: Under that assurance I will at this time overrule the objection of counsel.

“MR. PERRY: So that there is not any confusion, if your Honor please, I make an offer of these documents in evidence. For the purpose of

the record, and protecting the record, I would like to have them received in evidence.

“THE COURT: I will receive them for identification.

“MR. PERRY: Your Honor, do I understand by that that they are not to be received in evidence? I am making the offer in evidence and not for identification.

“THE COURT: They will be received for identification only.

“MR. PERRY: Note an exception.”

(Documents marked as Defendant's Exhibit 1 for identification) [26]

### XIII.

The Court erred to the substantial prejudice of the defendant in denying defendant's motion for instruction to the jury to disregard prejudicial misconduct on the part of the Assistant United States Attorney, as will more fully appear as follows:

AGENT DE KALB testified:

“MR. GOULDEN: Q What did you find on the defendant when you made a search of the defendant?

“MR. PERRY: For the purpose of the record, your Honor, and in order to preserve the rights of my client, I must object upon the ground that any testimony that this witness is going to give in this particular respect violates the constitutional rights of the defendant, particularly with respect to the Fourth and Fifth Amendments; on the further ground that there was a hearing before the United

States Commissioner, a motion to suppress was filed upon the complaint before the Commissioner, and that the case was dismissed before the Commissioner, and an order by Judge Kerrigan was made directing the return of certain papers. The testimony that this witness no doubt intends to give now in all probability relates to those documents which were ordered returned. I make that statement as a preliminary statement to my objection. I object on those grounds.

“MR. GOULDEN: There is no question the documents were returned. The Government does not make any contention that they were not returned. There is nothing in the order that says they were never seized or that there were no such papers. The Government certainly has the right to show that such papers existed. The order, itself, apparently would show that, but I think we are entitled to show what those papers are.

“MR. PERRY: I take an exception to counsel’s statement as to the extent of his rights. There is an objection before your Honor.

“THE COURT: This court has to decide at this time whether the evidence as such would warrant its reception. I presume that the order was predicated upon certain hearings. I don’t know whether you are getting into a situation where you are proposing [27] to offer something that should not be offered. It is only by subsequent testimony that the Court can be satisfied that it was or was not proper. I will have to know, and I do not recall it now if it was ever before me, as to whether this

defendant was properly arrested so as to warrant the reception of this evidence.

“MR. PERRY: I wish to make the further objection, since your Honor has not ruled at the present time, upon the ground that the documents, themselves, that they took from the defendant Rocchia, are the best evidence.

“MR. GOULDEN: There is no question about that, your Honor, and if the defendant desires to produce them we will be glad to use them.

“MR. PERRY: I object to that as an improper remark by counsel.

“THE COURT: I think you are inviting trouble on yourself, Mr. Perry. He can demand any documents proper to be introduced by you. If he is demanding them, it is true that he has not gone through the formality of a notice to produce, for instance. Of course, if it is something that should not properly be before the Court that is another situation. So far as I know yet there is nothing to indicate that it was or it was not proper. The defendant was under arrest, and a defendant under arrest can be searched if properly arrested.

“MR. PERRY: I want to renew my objection to Mr. Goulden’s statement calling upon the defendant to produce certain documents, because it is in effect calling upon him to testify against himself. I assign the remarks of counsel for the Government as prejudicial misconduct, and I instruct your Honor to direct the jury to disregard them.

“THE COURT: The Court refuses to receive the instruction.

“MR. PERRY: I am sorry I said that word, your Honor, I didn’t intend to. I object to counsel’s remarks in calling [28] upon the defendant to produce certain documents, because he is in effect calling on him to testify and it is prejudicial misconduct on his part, and I ask your Honor to instruct the jury to disregard the remarks of the United States Attorney.

“THE COURT: The objection will be overruled.

“MR. PERRY: And, furthermore, with all due respect to Your Honor, I take an exception to your Honor’s remarks. Your Honor stated that the Government had the right to call on the defendant by subpoena or otherwise to produce certain documents. I assign the remarks of your Honor as misconduct.

“THE COURT. I don’t recall any such statement on the part of the court; I said nothing about a subpoena. If you will examine the record I think you will find that that is in the vaporings of your imagination, Mr. Perry.

“MR. PERRY: I ask your Honor to instruct—

“THE COURT: You will find that I didn’t suggest any subpoena or any other action.

“MR. PERRY: You stated he could call on the defendant to produce certain documents.

“THE COURT: The objection will be overruled.

“MR. PERRY: I take an exception, your Honor, both with respect to the ruling as to Mr. Goulden and also with respect to yourself.”

## XIIIa.

The United States Attorney was guilty of misconduct, which misconduct was substantially prejudicial to the rights of said defendant and prevented him from having a fair and impartial trial, as will more fully appear as follows:

AGENT DE KALB testified:

“MR. GOULDEN: Q What did you find on the defendant when [29] you made a search of the defendant?

“MR. PERRY: For the purpose of the record, your Honor, and in order to preserve the rights of my client, I must object upon the ground that any testimony that this witness is going to give in this particular respect violates the constitutional rights of the defendant, particularly with respect to the *Fourth* and *Fifth* Amendments; on the further ground that there was a hearing before the United States Commissioner, a motion to suppress was filed upon the complaint before the Commissioner, and that the case was dismissed before the Commissioner, and an order by Judge Kerrigan was made directing the return of certain papers. The testimony that this witness no doubt intends to give now in all probability relates to those documents which were ordered returned. I make that statement as a preliminary statement to my objection. I object on those grounds.

“MR. GOULDEN: There is no question the documents were returned. The government does not make any contention that they were not returned. There is nothing in the order that says



they were never seized or that there were no such papers. The Government certainly has the right to show that such papers existed. The order, itself, apparently would show that, but I think we are entitled to show what those papers are.

“MR. PERRY: I take an exception to counsel’s statement as to the extent of his rights. There is an objection before your Honor.

“THE COURT: This court has to decide at this time whether the evidence as such would warrant its reception. I presume that the order was predicated upon certain *hearings*. I don’t know whether you are getting into a situation where you are proposing to offer something that should not be offered. It is only by [30] subsequent testimony that the Court can be satisfied that it was or was not proper. I will have to know, and I do not recall it now if it was ever before me, as to whether this defendant was properly arrested so as to warrant the reception of this evidence.

“MR. PERRY: I wish to make the further objection, since your Honor has not ruled at the present time, upon the ground that the documents, themselves, that they took from the defendant Rocchia, are the best evidence.

“MR. GOULDEN: There is no question about that, your Honor, and if the defendant desires to produce them we will be glad to use them.

“MR. PERRY: I object to that as an improper remark by counsel.

“THE COURT: I think you are inviting trouble on yourself, Mr. Perry. He can demand any



documents proper to be introduced by you. If he is demanding them, it is true that he has not gone through the formality of a notice to produce, for instance. Of course, if it is something that should not properly be before the Court that is another situation. So far as I know yet there is nothing to indicate that it was or it was not proper. The defendant was under arrest, and a defendant under arrest can be searched if properly arrested.

“MR. PERRY: I want to renew my objection to Mr. Goulden’s statement calling upon the defendant to produce certain documents, because it is in effect calling upon him to testify against himself. I assign the remarks of counsel for the Government as prejudicial misconduct, and I instruct your Honor to direct the jury to disregard them.

“THE COURT: The Court refuses to receive the instruction.

“MR. PERRY: I am sorry I said that word, your Honor, I [31] didn’t intend to. I object *t* counsel’s remarks in calling upon the defendant to produce certain documents, because he is in effect calling on him to testify and it is prejudicial misconduct on his part, and I ask your Honor to instruct the jury to disregard the remarks of the United States Attorney.

“THE COURT: The objection will be overruled.

“MR. PERRY: And, furthermore, with all due respect to your Honor, I take an exception to your Honor’s remarks. Your Honor stated that the Government had the right to call on the defendant

by subpoena or otherwise to produce certain documents. I assign the remarks of your Honor as misconduct.

“THE COURT: I don’t recall any such statement on the part of the Court; I said nothing about a subpoena. If you will examine the record I think you will find that that is in the vaporings of your imagination, Mr. Perry.

“MR. PERRY: I ask your Honor to instruct—

“THE COURT: You will find that I didn’t suggest any subpoena or any other action.

“MR. PERRY: You stated he could call on the defendant to produce certain documents.

THE COURT: The objection will be overruled.

“MR. PERRY: I take an exception, your Honor, both with respect to the ruling as to Mr. Goulden and also with respect to yourself.”

### XIIIb.

The Court was guilty of misconduct, which misconduct was substantially prejudicial to the rights of said defendant and prevented him from having a fair and impartial trial, as will more fully appear as follows:

AGENT DE KALB testified: [32]

“MR. GOULDEN: Q What did you find on the defendant when you made a search of the defendant?

“MR. PERRY: For the purpose of the record, your Honor, and in order to preserve the rights of my client, I must object upon the ground that any testimony that this witness is going to give

in this particular respect violates the constitutional rights of the defendant, particularly with respect to the Fourth and Fifth Amendments; on the further ground that there was a hearing before the United States Commissioner, a motion to suppress was filed upon the complaint before the Commissioner, and that the case was dismissed before the Commissioner, and an order by Judge Kerrigan was made directing the return of certain papers. The testimony that this witness no doubt intends to give now in all probability relates to those documents which were ordered returned. I make that statement as a preliminary statement to my objection. I object on those grounds.

“MR. GOULDEN: There is no question the documents were returned. The Government does not make any contention that they were not returned. There is nothing in the order that says they were never seized or that there were no such papers. The Government certainly has the right to show that such papers existed. The order, itself, apparently would show that, but I think we are entitled to show what those papers are.

“MR. PERRY: I take an exception to counsel’s statement as to the extent of his rights. There is an objection before your Honor.

“THE COURT: This court has to decide at this time whether the evidence as such would warrant its reception. I presume that the order was predicated upon certain hearings. I don’t know whether you are getting into a situation where you are proposing [33] to offer something that should

not be offered. It is only by subsequent testimony that the Court can be satisfied that it was or was not proper. I will have to know, and I do not recall it now if it was ever before me, as to whether this defendant was properly arrested so as to warrant the reception of his evidence.

“MR. PERRY: I wish to make the further objection, since your Honor has not ruled at the present time, upon the ground that the documents, themselves, that they took from the defendant Rocchia, are the best evidence.

“MR. GOULDEN: There is no question about that, your Honor, and if the defendant desires to produce them we will be glad to use them.

“MR. PERRY: I object to that as an improper remark by counsel.

“THE COURT: I think you are inviting trouble on yourself, Mr. Perry. He can demand any documents proper to be introduced by you. If he is demanding them, it is true that he has not gone through the formality of a notice to produce for instance. Of course, if it is something that should not properly be before the Court that is another situation. So far as I know yet there is nothing to indicate that it was or it was not proper. The defendant was under arrest, and a defendant under arrest can be searched if properly arrested.

“MR. PERRY: I want to renew my objection to Mr. Goulden’s statement calling upon the defendant to produce certain documents, because it is in effect calling upon him to testify against himself. I assign the remarks of counsel for the Govern-

ment as prejudicial misconduct, and I instruct your Honor to direct the jury to disregard them.

“THE COURT: The Court refuses to receive the instruction. [34]

“MR. PERRY: I am sorry I said that word, your Honor, I didn’t intend to. I object to counsel’s remarks in calling upon the defendant to produce certain documents, because he is in effect calling on him to testify and it is prejudicial misconduct on his part, and I ask your Honor to instruct the jury to disregard the remarks of the United States Attorney.

“THE COURT: The objection will be overruled.

“MR. PERRY: And, furthermore, with all due respect to your Honor, I take an exception to your Honor’s remarks. Your Honor stated that the Government had the right to call on the defendant by subpoena or otherwise to produce certain documents. I assign the remarks of your Honor as misconduct.

“THE COURT: I don’t recall any such statement on the part of the Court; I said nothing about a subpoena. If you will examine the record I think you will find that that is in the vaporings of your imagination, Mr. Perry.

“MR. PERRY: I ask your Honor to instruct——

“THE COURT: You will find that I didn’t suggest any subpoena or any other action.

“MR. PERRY: You stated he could call on the defendant to produce certain documents.

“THE COURT: The objection will be overruled.

“MR. PERRY: I take an exception, your Honor, both with respect to the ruling as to Mr. Goulden and also with respect to yourself.”

### XIIIc

The court erred to the substantial prejudice of the defendant in denying the defendant's motion for instruction to the jury to disregard prejudicial misconduct on the part of the court, as will more fully appear as follows: [35]

AGENT DE KALB testified:

“MR. GOULDEN: Q What did you find on the defendant when you made a search of the defendant?

“MR. PERRY: For the purpose of the record, your Honor, and in order to preserve the rights of my client, I must object upon the ground that any testimony that this witness is going to give in this particular respect violates the constitutional rights of the defendant, particularly with respect to the Fourth and Fifth Amendments; on the further ground that there was a hearing before the United States Commissioner, a motion to suppress was filed upon the complaint before the Commissioner, and that the case was dismissed before the Commissioner, and an order by Judge Kerrigan was made directing the return of certain papers. The testimony that this witness no doubt intends to give now in all probability relates to those docu-



ments which were ordered returned. I make that statement as a preliminary statement to my objection. I object on those grounds.

“MR. GOULDEN: There is no question the documents were returned. The Government does not make any contention that they were not returned. There is nothing in the order that says they were never seized or that there were no such papers. The Government certainly has the right to show that such papers existed. The order, itself, apparently would show that, but I think we are entitled to show what those papers are.

“MR. PERRY: I take an exception to counsel’s statement as to the extent of his rights. There is an objection before your Honor.

“THE COURT: This court has to decide at this time whether the evidence as such would warrant its reception. I presume that the order was predicated upon certain hearings. I don’t know [36] whether you are getting into a situation where you are proposing to offer something that should not be offered. It is only by subsequent testimony that the Court can be satisfied that it was or was not proper. I will have to know, and I do not recall it now if it was ever before me, as to whether this defendant was properly arrested so as to warrant the reception of this evidence.

“MR. PERRY: I wish to make the further objection, since your Honor has not ruled at the present time, upon the ground that the documents, themselves, that they took from the defendant Rocchia, are the best evidence.



“MR. GOULDEN: There is no question about that, your Honor, and if the defendant desires to produce them we will be glad to use them.

“MR. PERRY: I object to that as an improper remark by counsel.

“THE COURT: I think you are inviting trouble on yourself, Mr. Perry. He can demand any documents proper to be introduced by you. If he is demanding them, it is true that he has not gone through the formality of a notice to produce, for instance. Of course, if it is something that should not properly be before the Court that is another situation. So far as I know yet there is nothing to indicate that it was or it was not proper. The defendant was under arrest, and a defendant under arrest can be searched if properly arrested.

“MR. PERRY: I want to renew my objection to Mr. Goulden’s statement calling upon the defendant to produce certain documents, because it is in effect calling upon him to testify against himself, I assign the remarks of counsel for the Government as prejudicial misconduct, and I instruct your Honor to direct the jury to disregard them.

“THE COURT: The Court refuses to receive the instruction.

“MR. PERRY: I am sorry I said that word, your Honor, I didn’t intend to. I object to counsel’s remarks in calling [37] upon the defendant to produce certain documents, because he is in effect calling on him to testify and it is prejudicial misconduct on his part, and I ask your Honor to in-

struct the jury to disregard the remarks of the United States Attorney.

“THE COURT: The objection will be overruled.

“MR. PERRY: And, furthermore, with all due respect to your Honor, I take an exception to your Honor’s remarks. Your Honor stated that the Government had the right to call on the defendant by subpoena or otherwise to produce certain documents. I assign the remarks of your Honor as misconduct.

“THE COURT. I don’t recall any such statement on the part of the Court; I said nothing about a subpoena. If you will examine the record I think you will find that that is in the vaporings of your imagination, Mr. Perry.

“MR. PERRY: I ask your Honor to instruct——

“THE COURT: You will find that I didn’t suggest any subpoena or any other action.

“MR. PERRY: You stated he could call on the defendant to produce certain documents.

“THE COURT: The objection will be overruled.

“MR. PERRY: I take an exception, your Honor, both with respect to the ruling as to Mr. Goulden and also with respect to yourself.”

#### XIV.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

“WITNESS (Continuing) Investigator Burt displayed certain papers which he stated at that time he had taken from the person of the defendant Rocchia—

“MR. GOULDEN: Q Can you tell the Court and jury what these papers were? [38]

“MR. PERRY: I am going to object to that on the ground that the papers, themselves, are the best evidence.

“THE COURT: You can state what they appear to be. I don't suppose you can characterize it as any particular legal document, unless it was a legal document, unless it was read.

“MR. PERRY: I object to it further on the ground that any testimony he might give in this particular respect violates the defendant's constitutional rights, particularly with respect to the Fourth and Fifth Amendments; and on the ground based upon the previous offer with respect to the records before the United States Commissioner which were received for identification, and marked Defendant's Exhibit No. 1.

“THE COURT: Objection overruled.

“MR. PERRY: Exception.

“WITNESS (continuing): There was a list which was written partly in Italian and partly in English. The items ran 'Zuccherò,' and then an item, something like \$250. Yeast \$55. There was an item Carabinieri \$300. There was an item Canne, the amount I don't remember. These were all on one list. The items Zuccherò and Yeast were repeated a number of times. There was an item about

a carpenter \$25. There was an item indicating the name Fran and an amount of money after it. There were several other items which I do not recall at this time. There was a receipt on a foreign money order showing the name Rocchia. There was a driver's license showing the name of Antonio Rocchia. There was a couple of money orders or deposit slips in the American Trust Company Bank, I believe, showing amounts of money deposited in the name of Rocchia. There was on the bottom of a sales ticket the name of Deneri and a telephone number. There were certain cancelled checks. At this time I do not recall any other items but there were other papers, but I can't remember just what they were. One was a sales slip indicating an amount of sugar that had been sold.

“MR. GOULDEN: Q I show you a group of photographs of papers and ask you if you know what they are. [39]

“MR. PERRY: In order to lay the proper foundation, your Honor, I am going to object again to any testimony with respect to documents that he now has in his hands upon the ground that the originals are the best evidence; that there was a hearing before the United States Commissioner involving this same offense; that a motion to suppress was filed at the hearing and that the case was dismissed by the United States Commissioner, and that an order was made by Judge Kerrigan directing the return of certain papers. The record to which I just referred with respect to the hearing

before the Commissioner is Defendant's Exhibit 1 for identification. I object to it upon the ground that by virtue of the order issued by Judge Kerri-gan it violates the defendant's constitutional rights when he is called upon to give testimony and evidence against himself. I make *ny* objection on that ground, your Honor.

"MR. GOULDEN: There is no question about the documents having been returned. I don't know it personally, I was not in the office at that time, but I understand they were. I know there is an order. The order makes no mention of the fact that these exhibits were passed upon by the Court, or that the Court had ever seen them. It is a consent order signed by the counsel, agreed to by the Govern-ment's counsel that they must be returned. It in-advertently states that a motion to suppress was granted by the Commissioner. Whether it was or was not is not binding on this Court. We will produce the Commissioner on the witness stand.

"THE COURT: Any documents, if there were such documents, cannot be gotten at this time.

"MR. GOULDEN: The Government has made no demand, your Honor.

"THE COURT: I think the only thing that can be done is to have the witness testify whether this appears to be a copy of the true document taken from the defendant at that time.

"A All with the exception of these three checks which do not represent anything that were on the person of the defendant [40] were shown to me by Investigator Burt.

“MR. PERRY: Your Honor, may we have a ruling on my objection?”

“THE COURT: You mean the objection made last?”

“MR. PERRY: Yes, your Honor.

“THE COURT: The objection will be overruled. Of course, you are right that we cannot get anything from the defendant. You are absolutely correct on that. It would be testifying against himself. There is no doubt but that these photographs can be taken into consideration if they are true photographs of the documents that were upon the person of the defendant at the time which has been testified to.

“MR. PERRY: Exception.

“WITNESS (Continuing) These photographs appear to be exact replicas of the originals taken from the person of Mr. Rocchia; they resemble the photographs; I believe they are true photographs of the originals.”

(The photographs were here marked U. S. Exhibits 5 and 6 for identification.)

## XV.

The Court erred in admitting documentary evidence over the objection of the defendant as will more fully appear as follows:

DE KALB testified relative to three photos of still as follows:

“These three small prints are prints of the picture that I took; these two were taken that night and this one was taken the following morning about



daylight. Investigators Goggin and Burt are *shown* in this picture. They depict the condition as it existed on the night I entered the building, with the excep- [41] tion of the position of certain hoses, I think certain hoses were turned around, and one shows a light that I put down on the floor in order to take the picture. With respect to the vats and the cans of alcohol and the sacks of sugar it is just the same.

“MR. GOULDEN: I ask that these three photographs be offered in evidence as Government’s Exhibit next in order.

“MR. PERRY: I object to these photographs being offered in evidence on the ground that they violate the constitutional rights of the defendant, particularly with respect to the Fourth and Fifth Amendments to the Constitution, by what they portray. They portray what has not been testified by way of evidence.

“THE COURT: The objection is overruled; they will be received as Government’s Exhibit 2 in evidence. They are received for the purpose of illustration.

“MR. PERRY: Exception.”

## XVI.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

GOGGINS testified:

“I went to the large garage door at 60 Brady Street, the door was about two or three inches ajar,



it was not tightly closed, I opened the door and entered with Investigator De Kalb and Investigator Burt, then turned to the left as I entered and there was a door to the left which was unlocked and which I opened and I entered the next room. Investigator De Kalb opened another door and we entered the still premises and placed Ferrari under arrest. [42]

“MR. GOULDEN: Q What did you find in the still room proper?”

“MR. PERRY: I object to anything the witness might have found in the still room proper upon the ground that it violates the Constitutional rights of the defendant on trial under the Fourth and Fifth Amendments.

“THE COURT: Objection overruled.

“MR. PERRY: Exception.

“A. I found two stills in operation; I found four 5000-gallon vats full of mash; I found one 5000-gallon vat about half full. I found about 1000 gallons of alcohol.”

## VII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant, as will more fully appear as follows:

AGENT GOGGINS—witness:

“MR. GOULDEN: Q Does Government’s Exhibit No. 1 in evidence correctly describe the floor plan of the still room so far as the partitions and the lay-out of the still property, the vats and the stills, themselves, are concerned?”

“A. Yes.

“MR. PERRY: Just a moment. I object to the question on the ground it violates the constitutional rights of the *derendant*, particularly with respect to the Fourth and Fifth Amendments.

“THE COURT: The objection is overruled.

“MR. PERRY: Exception.”

### XVIII.

The court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear [43] as follows:

“MR. GOULDEN: Q Was anything taken from the person of Ferrari?

“MR. PERRY: I object to the question on the ground that it violates the constitutional rights of the defendant, particularly as respects the Fourth and Fifth Amendments.

“THE COURT: Objection overruled.

“MR. PERRY: Exception.

“A A key.”

### XIX.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

“MR. GOULDEN: Q Did you search this man Cappi?

“A He was searched in my presence.

“Q Was anything found on his person? A A key.

“MR. PERRY: I object to that on the ground that it is a violation of the rights of the defendant

under the Fourth and Fifth Amendments to the Constitution, so far as the defendant Rocchia is concerned.

“THE COURT: The objection is overruled.

“MR. PERRY: Exception.

“A There was a key found on his person.” (Government’s Exhibit 3 for identification and #5 in evidence) [44]

## XX.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

Agent GOGGIN testified:

“We left the still premises between 6:30 and 7 o’clock. Investigator Burt was left in charge. We returned about ten o’clock that evening and Investigator Burt was on the premises when we returned.

“MR. GOULDEN: Q Who was with him, if you know?

“MR. PERRY: We object to that on the ground that it violates the rights of the defendant under the Fourth and Fifth Amendments to the Constitution of the United States.

“THE COURT: Objection overruled.

“MR. PERRY: Exception.

“A. The defendant Tony Rocchia, who gave his name at that time as John Caruso, was on the premises with Inspector Burt.”

XXI.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

MR. GOGGIN (Continuing) "I had a conversation with Investigator Burt at that time.

"MR. GOULDEN: Q What was that conversation?

"MR. PERRY: I object to anything said by this defendant, or by the agents in the presence of the defendant, upon the ground that it violates the constitutional rights of this defendant, particularly with respect to the Fourth and Fifth Amendments.

"THE COURT: Objection overruled.

"MR. PERRY: Exception. [45]

"A I said 'It appears that you have the big shot.' Investigator Burt answered saying, 'Search him and see for yourself.'"

XXII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

"MR. GOULDEN: Q Did you search the defendant Rocchia?

"MR. PERRY: I am going to assign the remarks of this witness in saying that Rocchia was the big shot as improper on the part of the witness and ask your Honor to instruct the jury to disregard it.

“THE COURT: Q At that time nothing was said by the defendant, at all, was there? A No, your Honor.

“Q He stood mute? A Yes, your Honor.

“THE COURT: The objection will be overruled.

“MR. PERRY: If your Honor please, this witness for the first time came into the room and he said, according to his testimony, ‘It looks like he is the big shot.’ He never saw the man before. My objection is that any such remark upon the part of the witness is misconduct in making such a statement, and I assign it as such and I ask that the remarks be withdrawn and that the jury be instructed to disregard them.

“MR. GOULDEN: The witness was asked what statement he made, or some question to that effect. If that is the statement that was made that is the only answer he can give.

“MR. PERRY: This witness could have said anything he pleased when he stepped into that room. It is what the defendant might have said that counts. It is not what this witness could possibly say.

“THE COURT: It is a question whether a man has a question directed to him or when things are said that apply to him, it is [46] of moment to know how a man acts or what he says in response thereto. In this case these statements were made in his presence and he did not elect to reply. I will allow it to remain in the record.

“MR. PERRY: Exception.”

XXIII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant, as will more fully appear as follows:

“MR. GOULDEN: Q What did you find as a result of the search of the person of Rocchia?

“MR. PERRY: I object to that also as calling for the opinion and conclusion of the witness, and it violates the Fourth and Fifth Amendments to the Constitution as to the defendant Rocchia.

“MR. GOULDEN: The only thing that question can possibly bring out is what the man found, and not any conclusions of his.

“THE COURT: I will allow the question.

“MR. PERRY: Exception.

“A I found a key in his pocket.”

XXIV.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows: AGENT GOGGIN (Continuing) “Investigator DeKalb searched the defendant in my presence.

“MR. GOULDEN: Q What did the search of Investigator DeKalb reveal in your presence, what did he find?

“MR. PERRY: I object to that on the ground that it violates the Fourth and Fifth Amendments to the Constitution of the United States in so far as the defendant Rocchia is concerned.

“THE COURT: Q Did you see him take anything off the person of the defendant? A Yes, I did.



“MR. GOULDEN:

“Q Counsel can object to this question if he wishes to. What did he find? [47]

“MR. PERRY: I object to that on the ground that it violates the rights of the defendant under the Fourth and Fifth Amendments to the Constitution upon the ground that in the matter pending before the United States Commissioner, as evidenced by Defendant’s Exhibit No. 1 for identification, there was a motion made, a petition filed to exclude evidence, and as a result of the hearing an order was made for the return of the personal property together with the bond in that particular matter. Any testimony that this witness might give in response to the question propounded to him would be with respect to documents that were ordered returned in accordance with the order of Judge Kerrigan as set forth in Defendant’s Exhibit 1 for identification. I object to it upon the ground that any documents that he might refer to the originals are the best evidence.

“THE COURT: We have not reached a lot of those points that you are making. The objection is overruled.

“MR. PERRY: Exception.

“A He took a wallet from his person. Investigator De Kalb took from the defendant’s person, from his inside coat pocket, a wallet which contained \$1600 in currency.”



XXV.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

“Q Was any conversation had at that time in regard to money?

“A Yes, there was.

“Q What was that conversation?

“MR. PERRY: I object upon the ground that it violates the rights of the defendant under the Fourth and Fifth Amendments to the Constitution.

“THE COURT: Overruled.

“MR. PERRY: Exception.

“A I asked Investigator Burt if the defendant offered him the money and he said he did; the defendant did not deny it.” [48]

XXVI.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

“Agent Goggins (continuing): We took him (Rocchia) to our office and finger printed him. Government’s Exhibit #7 for identification is one of the cards. We took three.

“Q. Whose finger prints are they?

“MR. PERRY: That is objected to as being immaterial, irrelevant and incompetent. The United States Attorney stated that he wanted to use the writing or the signature on there as an exemplar. Whose finger prints they are does not make any material difference.

“THE COURT: Objection overruled.

“MR. PERRY: Exception.

“A I saw the finger print made and I saw the fingers of the defendant here on trial placed on the card so as to make these imprints. I saw the card signed; it was signed by the defendant Rocchia in my presence. The signature that he placed on there was John Caruso. The card was marked U. S. No. 3 in evidence.”

## XXVII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

Agent Goggins.

“Q Did Investigator Burt make any statements, after you and Mr. De Kalb had searched the defendant Rocchia? A He did. Investigator Burt had papers which he stated he seized or found on the defendant’s person.” [49]

“Q I show you Government’s Exhibits 5 and 6 for identification, (later received as Government’s Exhibits Nos. 7 and 8 in evidence) No. 5 being three photographs and No. 6 being seven photographs, and I will ask you if they appear to be photographs of the documents you saw in Investigator Burt’s possession which he claimed to have taken from the person of the defendant Rocchia on the evening of January 9, 1933, in the still building?

“MR. PERRY: I am going to interpose an objection, your Honor, that the question violates the rights of the defendant, and particularly as respects

the Fourth and Fifth Amendments to the Constitution; that he is testifying from photostats, the originals being the best evidence. Upon the further ground that there was a hearing before Commissioner Williams and a complaint filed and a petition for the exclusion of evidence and the return of property was filed, and an order for the return of the personal property which was taken from the possession of the defendant Rocchia was ordered by Judge Kerrigan in this District Court, and that any testimony that this witness might give with respect to those particular documents violates that order and also the Fourth and Fifth Amendments to the Constitution.

“THE COURT: Q You could not very well *described* those documents, could you—I *eman* fully, as they were?

“A Not very well, your Honor.

“Q In viewing these photographs, do they truly depict the documents as you remember them? A. Yes, your Honor, I remember this one.

“Q Look at them all and see if they truly depict the documents which you saw and which the agent stated he removed from the person of the defendant at that time. A Yes, your Honor.

“THE COURT: The objection will be overruled. [50]

“MR. PERRY: Exception.

## XXVIII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

Agent Burt testified as follows:

“We entered the fore part of the building, and proceeded toward the rear until we got to a door which was on our left hand in another partition which ran from the front toward the back and divided the fore part of the still building into two rooms. The door was ajar. Investigator Goggin pushed it open and we went through and into the other room on the other side of the fore part of the still building, Investigator De Kalb then opened another small door which was closed but not locked, and through which we could see light through the keyhole and also around the cracks of the door. The three of us entered the rear part of the still building, and there was a large alcohol *distrillery* in operation, and we——

“MR. PERRY: Just a moment, please. I object to any further testimony of this witness as to what he found, or saw, or heard within the premises upon the ground that it violates *and* constitutional rights of the defendant Rocchia, particularly with respect to the Fourth and Fifth Amendments to the Constitution.

“THE COURT: The objection will be overruled.

“MR. PERRY: Exception.”

XXIX.

The Court erred in admitting documentary evidence over the objection of the defendant, as will more fully appear as follows: [51]

Agent Burt testified as follows:

“On January 30th of that year I marked Ferrari’s initial on the key. The marking is right here, the letter “F,” scratched in the metal. I had kept the keys separately until that time.

“MR. GOULDEN: I ask, your Honor, that this key be placed in evidence as Government’s Exhibit next in order.

“MR. PERRY: I object to it on the ground that it violates the constitutional rights of the defendant Rocchia, particularly as respects the Fourth and Fifth Amendments.

“THE COURT: The objection is overruled. It will be received as Government’s Exhibit 4 in evidence.

“MR. PERRY: Exception.”

XXX.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

Agent Burt testified:

“Investigators Goggin and De Kalb left with Ferrari and Cappi to take them to the prison and book them, leaving me in the custody of the premises.

“MR. GOULDEN: Q What happened at 8:10 p. m.?”

“MR. PERRY: I object to any testimony that this witness might give as to what happened at 8:10 p. m. on the ground that it will violate the constitutional rights of the defendant Bocchia, particularly as respects Amendments Four and Five to the Constitution.

“THE COURT: Objection overruled.

“MR. PERRY: Exception.

“A I had started for what was Door No. 5, intending to go up and look over the mezzanine floor more carefully, and I heard footsteps out in front of the premises, and saw a sort of a shadow of a man's head and shoulders passing in front. I stopped in the middle of the room. The foot steps ceased in front of [52] the small door, I then heard again the rattle of a key in the lock and I stepped under the stairs which led up to the mezzanine floor and concealed myself. I heard the small door open and close and then Door No. 5 was opened—it was not locked at that time; it was opened and I heard a man step down into this larger room. I stepped out from under the stairs and threw the beam of my flashlight in his face and told him that I was a federal officer and that he was under arrest.”



XXXI.

The Court erred in admitting documentary evidence over the objection of the defendant, as will more fully appear as follows:

Agent Burt (continuing)

“Q Did you have any conversation with the defendant Rocchia when you went into the hill room? A Yes, sir.

“Q What was that conversation?

“MR. PERRY: I object to any conversation on the ground that it would be in violation of the constitutional rights of the defendant, particularly as respects the Fourth and Fifth Amendments.

“THE COURT: Objection overruled.

“MR. PERRY: Exception.

“A He turned to me and said, ‘Are you really a federal officer?’ I said, ‘I am,’ and I showed him my badge. He said, ‘Suppose I give you \$500 and you let me walk out and nobody will ever know the difference.’ ”

XXXII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows: [53]

Agent Burt (Continuing)

“Q Is there anything about that key (U. S. Exhibit No. 4 for identification) that makes you certain that that is the key that Rocchia had? A The initial ‘R’ scratched in the metal.

“Q Who placed that there? A I did.



“MR. GOULDEN: I ask, your Honor, that Government’s Exhibit 4 for identification be now received in evidence.

“THE COURT: It will be received and marked Government’s Exhibit 6 in evidence.

“MR. PERRY: I object to it on the ground that it violates the constitutional rights of the defendant, particularly as respects Amendments Four and Five.

“THE COURT: Objection overruled.

“MR. PERRY: Exception.”

### XXXIII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

Agent Burt (continuing)

“MR. GOULDEN: Q Would you recognize the papers that were seized from the defendant if you saw them again? A I would.

“Q I show you three documents marked Government’s Exhibit 5 for identification, purporting to be photographs of certain papers; also seven photographs marked Government’s Exhibit 6 for identification, and ask you if you ever saw them before, or the originals from which they might be taken?

“MR. PERRY: I object to the question upon the ground that it violates the defendant’s constitutional rights under the Fourth and Fifth Amendments; that a complaint was filed before the United States Commissioner in this District charging

the [54] defendant Rocchia with violating the National Prohibition Act, and that that was on January 10, 1933, and that it was signed by William Goggins; that a petition for the exclusion of evidence and return of property was filed and an order of court was made directing the return of the personal property. I object to this on the ground that the originals are the best evidence.

“MR. GOULDEN: There is no question about that, your Honor.

“THE COURT: You are offering them as next in order, are you?

“MR. GOULDEN: No, I am asking the witness if he can identify these.

“THE COURT: Objection overruled.

“MR. PERRY: Exception.”

#### XXXIV.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

Agent Burt (continuing)

“Q In other words, you are not able to describe those documents accurately, are you? A Some I can describe accurately.

“Q All the way through and as to language, etc.? A I could not reproduce every word on these documents.

“Q In view of that, and looking at these photographs, do they depict the documents which you removed from the defendant?

“A Yes, sir.

“MR. PERRY: To the questions your Honor just asked, may I reserve an objection to them also?”

“THE COURT: Objection overruled.

“MR. PERRY: Exception.” [55]

### XXXV.

The court erred in admitting documentary evidence over the objection of the defendant as will more fully appear as follows:

Agent Burt (continuing)

“Q Did you retain possession of the papers taken from the defendant Rocchia? A I did until along about the first part of February, I don't recall the exact date.

“Q Did you make any reproductions of those papers prior to the 1st day of February? A Investigator Hauptman in my presence made photographs of these papers, developing negatives, and made the prints.

“Q All in your presence? A All in my presence.

“Q Did you do anything to identify these documents as being the documents that were made in your presence? A Yes, I wrote my initials and the date on the back of each one.

“Q Anybody else's initials *palced* there? A Yes.

“Q Who? A Investigator Hauptman's initials.

“Q Were they placed there in your presence?

A Yes.

“MR. GOULDEN: We ask that they be received in evidence as Government’s Exhibits next in order.

“THE COURT: Government’s Exhibits 7 and 8.

“MR. PERRY: I object to their introduction upon the ground that the originals are the best evidence; upon the ground that a complaint was filed before the United States Commissioner on January 10, 1933, charging this defendant with a violation of the National Prohibition Act, signed William P. Goggin; and a petition for the exclusion and suppression of evidence and the return of property was made and an order was made for the return of the personal property, signed by Judge Kerrigan, upon the [56] dismissal of the case, which are referred to in Defendant’s Exhibit 1 for identification. I object to it upon the ground that the receipt of these documents is prejudicial to the defendant and violates his constitutional rights, particularly as respects Amendments Four and Five. In respect to the objection to the introduction of the photostatic copies in evidence, as a preliminary matter I wish at this time, for the purpose of the record, to offer in evidence the documents I referred to, and particularly those documents which are now part of Defendant’s Exhibit 1 for identification.

“THE COURT: The objection will be overruled and the offer will be denied.

“MR. PERRY: Exception.

## XXXVI.

The court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

Agent Burt (continuing)

“Q Who was present when they returned besides yourself?

“A The defendant Rocchia.

“Q In other words, when the two agents returned there were four men in the still room? A Yes.

“Q What conversation did you have, if any, with either of the agents Goggin or De Kalb upon their return?

“MR. PERRY: For the purpose of preserving the record, I am going to make the same objection to this question, that is, the constitutional objection.

“THE COURT: Objection overruled.

“MR. PERRY: Exception.

“A Investigator Goggin walked over in front of the defendant [57] Rocchia, who was seated on a yeast box or on a five-gallon can and stopped in front of him and looked down and said, ‘Well, John, it looks as if you have the big shot.’ ”

## XXXVII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

Agent Burt (continuing)

“Q Was there any further conversation either between yourself and the defendant or between

*yourslf* and the two agents with you in the presence of the defendant? A After the money had been counted and returned to the defendant Investigator Goggin turned to me and said——

“MR. PERRY: Now, just a moment. I am sorry to interrupt but I think probably the line of answer would be along the line of the other testimony, and I wish to make this objection, that any statement that Goggin might make in the presence of this defendant is purely self-serving as far as the agents, themselves, are concerned. In fact, they could make any statement they pleased in the presence of any defendant, including this defendant, and then could take the stand and say they said such and such in front of a certain defendant, whereas as a matter of fact it is not binding upon the defendant at all, it is purely self-serving.

“MR. GOULDEN: The purpose of the question is to develop what the defendant did under the circumstances.

“THE COURT: I will allow the question.

“MR. PERRY: Exception. [58]

“A Investigator Goggin said, ‘Didn’t he try to pay off?’ And I said, ‘Yes, he did.’ ”

### XXXVIII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

“Q Was there any further conversation? A He was then questioned——

“MR. PERRY: Just a moment, please. I am going to object for the purpose of the record to



any further testimony as to what was said and done upon the grounds heretofore urged, the same grounds heretofore urged.

“THE COURT: Objection will be overruled.

“MR. PERRY: Exception.

AGENT BURT (continuing)

“A. He was then questioned in the presence of all of us and he stated that he had been approached by a strange man down on Third Street who had given him the key and told him if he would go up to 60 Brady Street he might find some work, that he knew nothing about the still or its ownership. At that point he refused to answer any further questions.”

### XXXIX.

The Court erred in admitting documentary evidence over the objection of the defendant as will more fully appear as follows:

“MR. GOULDEN: I ask that the can of alcohol be admitted into evidence as Government’s Exhibit next in order. [59]

“MR. PERRY: I am going to object to it solely upon the constitutional ground, that any evidence that might be taken in the place, such as the offer now being made, would violate the constitutional rights of the defendant, particularly as respects the Fourth and Fifth Amendments.

“THE COURT: Objection overruled. It will be received as Government’s Exhibit 9 in evidence.

“MR. PERRY: Exception.”



## XL.

The Court erred in admitting in evidence certain testimony over the objection of the defendant, as will more fully appear as follows:

Harold Von Husen testified:

“Q I show you Government’s Exhibit 8 (in evidence) and ask you if that is a true photo or copy of the note you left under the door?”

“MR. PERRY: I am going to object to the question upon the ground that any testimony which this witness might give with respect to Government’s Exhibit 8 will violate the constitutional rights of the defendant on trial, particularly as respects amendments Four and Five. I repeat for the purpose of the record that a complaint was filed before the Commissioner charging the defendant with violating the National Prohibition Act in January of 1933 for the same offense for which he is being charged here now, arising out of the same transaction, and that a motion to suppress was filed, and that the matter was dismissed, I mean the case was dismissed as to Rocchia; that an order in the District Court was signed ordering the return of all papers, and that those documents are contained in Defendant’s Exhibit 1 for identification. The document that the witness now refers to is a photostatic copy, as I understand it from previous testimony, of certain papers that were taken from the defendant Rocchia’s person.

“THE COURT: The objection is overruled. [60]

“MR. PERRY: Exception.

“A That is a true copy.”

## XLI.

The Court erred in refusing to admit in evidence certain testimony offered by the defendant as will more fully appear as follows:

E. E. Williams, U. S. Commissioner, testified relative to hearing on complaint and motion to suppress pending before him (and which is part of Defendant's Exhibit No. 1 for identification) as follows:

“I think I stated that my records would indicate that there was no ruling on the motion to suppress, because I have a notation here that Abrams, the Assistant United States Attorney, consented to the dismissal of Caruso and Cappi. There could have been a ruling on the motion to suppress but it would have been unnecessary, and I would have indicated it had I made a ruling; in other words, I would have disposed of the entire matter so far as those particular issues were concerned either by making a holding or a dismissal.

“MR. PERRY: I now offer the petition to suppress and to exclude evidence in evidence.

“THE COURT: We have testimony here that that was never acted upon and consequently it would not be a part of this case, so far as the Commissioner's testimony goes. The fact that it was filed in the case has no bearing here unless it was acted upon. Nobody has testified to that effect. It is part of Exhibit 1 for identification.

“MR. PERRY: I will take an exception to your Honor's ruling. I offer at the same time again the

order for the return of the property, signed by Judge Kerrigan in the same proceeding [61] which is a part also of Defendant's Exhibit 1 for identification; I offer that in evidence.

“THE COURT: The same ruling.

“MR. PERRY: Exception.”

XLII.

The Court erred in admitting documentary evidence over the objection of the defendant, as will more fully appear as follows:

Emile Canepa testified as follows:

“The notation on the third sheet of U. S. Exhibit 7 which I now hold in my hand is in the Italian language. I have made a true and correct translation of that into the English language and the document which you now hand me is that true and correct translation.

“MR. GOULDEN: I offer this translation in *evicence* and ask that it be marked Government's Exhibit next in order.

“MR. PERRY: I object to it on the ground that it would have a tendency to and would violate the constitutional rights of this defendant, particularly as respects the Fourth and Fifth Amendments.

“THE COURT: Objection overruled. It will be received as Government's Exhibit 11.

“MR. PERRY: Exception.”

## XLIII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows: [62]

EDWARD O. HEINRICH testified as follows:

“I have examined the finger print on the card, Government’s Exhibit No. 3, John Caruso. I have also examined the finger print on the card Government’s Exhibit No. 7 for identification, Antonio Rocchia.

“Q Are you prepared to say whether or not the finger prints are of the same man? A I am——

“MR. PERRY: Just one moment, please. I am going to make an objection now, and I will make an objection later on; I am going to object to the further use of the finger prints. As I understood it, when these documents were introduced in evidence first the only use of the documents was for the purpose of the handwriting. Now counsel for the Government endeavors to use by way of comparison the finger prints on those two cards, and [63] by those two cards I mean Government’s Exhibit No. 3 in evidence and Government’s Exhibit No. 7 for identification. I mention this at this time, your Honor, because they are trying to introduce or show prior transactions that this defendant may have had in other matters and to bring it in in this manner, and which could not have been brought into this court in any other way. In other words, by a subterfuge they are bringing in under the guise of the handwriting matter something to use against

this defendant. I object to it on that ground as a matter of principle.

“THE COURT: It is certainly pertinent evidence and I will overrule the objection. Let us proceed with the examination.

“MR. PERRY: Exception.”

XLIV.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

Edward O. Heinrich (continuing)

“Q Would you say at this time in your expert opinion that the finger prints on the two cards just referred to, Government’s Exhibit No. 7 for identification and Government’s Exhibit No. 3, are one and the same man?

“MR. PERRY: I object to it on the ground that the use of these documents is prejudicial so far as the defendant Rocchia is concerned, and I assign the examination and the use of those documents with respect to finger prints by the United States Attorney as misconduct, and I ask your Honor to instruct the jury to disregard it.

“THE COURT: The objection will be overruled.

“MR. PERRY: Exception.

“A They are the finger prints of one and the same individual.”

## XLV.

The Court erred in admitting documentary evidence [64] over the objection of the defendants as will more fully appear as follows:

“MR. GOULDEN: I neglected or I overlooked requesting that Government’s Exhibit No. 7 for identification be admitted in evidence. Professor Heinrich identified it, that being the finger print card with the signature Antonio Rocchia upon it.

“MR. PERRY: I object to it as immaterial, irrelevant, and incompetent, and upon the ground that it is prejudicial to the rights and interests of my client to introduce this document in evidence bearing his purported finger prints and his signature; it violates the constitutional rights of the defendant, particularly as respects the Fourth and Fifth Amendments.

“THE COURT: Objection overruled. It will be received as U. S. Exhibit 14 in evidence.

“MR. PERRY: Exception.”

## XLVI.

The Court erred in denying the motion of the defendant made at the conclusion of the plaintiff’s case, the defendant thereupon resting, there being no evidence introduced on behalf of defendant, that the jury be instructed to return a verdict of not guilty as will more fully appear as follows:

“MR. PERRY: I wish at this time to make a motion for a directed verdict. The motion for di-



rected verdict goes first to indictment No. 24941-L. The grounds of my motion are as follows:

“That the facts and allegations set forth in indictment No. 24941 do not constitute an offense against the laws of the United States because the allegations contained in counts 1, 2, 3, 4, 5, 6, and 7, and each of them, and with respect to them separately and severally, do not constitute an offense against the laws of the United States.

“Furthermore, on the ground that because in the trial of the case the evidence adduced on all counts and on each count, [65] separately and severally, of indictment No. 24941-L, showed that the discovery of the commission of the crime, if any, was secured by unlawful search and seizure, and in violation of the rights guaranteed to the defendant by the Fourth and Fifth Amendments to the Constitution of the United States, by reason whereof this Court has no jurisdiction to hear and determine said cause, or any part thereof.

“On the further ground because the indictment in each count, separately and severally, is vague, uncertain, and indefinite, and does not sufficiently state or aver or set forth the alleged offense charged in said counts and each of them against said defendant, or the acts or facts constituting the same so as to apprise said defendant of the crime or the offense with which he therein stands charged.

“On the further ground because the evidence introduced as to indictment No. 24941-L, and as to each count of said indictment, separately and sev-



erally, was insufficient to support a charge under the indictment.

“Furthermore, because of error in admitting evidence as to any offense under indictment 24941-L, as to each count thereof, separately and severally.

“Further, upon the ground that there was admitted incompetent evidence offered by the United States.

“Further, that the Court erred upon the trial of said cause in deciding questions of law arising during the course of the trial, which errors were duly excepted to.

“As a further ground, the misconduct of the United States Attorney, which was duly and regularly assigned during the course of the trial and exceptions to which were taken.”

#### XLVII.

The Court erred in denying defendant’s motion for new trial, to which ruling defendant then and there duly excepted. [66]

#### XLVIII.

The Court erred in denying defendant’s motion in arrest of judgment, to which ruling the defendant then and there duly excepted.

#### XLIX.

The Court erred in pronouncing judgment and sentence against defendant, to which the defendant then and there duly excepted.

WHEREFORE, for the many manifest errors committed by said Court, the defendant prays that

said sentence and judgment of conviction be reversed; and for such other and further relief as to the Court may seem meet and proper.

Dated at San Francisco, California, this 3rd day of July, 1934.

GEO. J. HATFIELD

FRANK J. PERRY

Attorneys for Defendant.

Service of a copy of the within Assignment of Errors admitted this 7th day of July, 1934.

H. H. McPIKE

United States Attorney

By R. B. McMILLAN

Assistant United States Attorney.

[Endorsed]: Filed Jul 9 1934 [67]

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[Title of Court and Cause.]

ENGROSSED BILL OF EXCEPTIONS ON  
BEHALF OF DEFENDANT ANTONIO  
ROCCHIA

BE IT REMEMBERED, that heretofore, towit, on November 14, 1933, the Grand Jury of the United States, in and for the Northern District of California, Southern Division, did find and return into and before the above entitled court its indictment against Antonio Rocchia, Frank Ferrari and Silvio Cappi.

AND BE IT FURTHER REMEMBERED, that thereafter, towit, on December 23, 1933, the said

defendant Antonio Rocchia subscribed to and filed a verified document termed "Plea in Abatement and Motion to Suppress Evidence;" that on the same day, towit, December 23, 1933, the hearing on said Plea in Abatement and Motion to Suppress Evidence was set for January 6, 1934, by the court; that said Plea in Abatement and Motion to Suppress Evidence and Documents taken at the time of the arrest of defendant was based upon the alleged ground that said taking was in violation of the constitutional rights of said defendant, particularly as respects the Fourth and Fifth Amendments to the Constitution of the United States. That thereafter and on [68] January 6, 1934, Thos. G. Goulden, Esq., Assistant United States Attorney, and Geo. J. Hatfield, Esq., attorney for defendant, being present in court and answering ready for all parties, the following proceedings were had: The Plea in Abatement was submitted to the court without argument thereon on behalf of defendant and taken under advisement by the court, and thereafter upon stipulation of the parties and consent of the court that the hearing on the Motion to Suppress might be had prior to ruling of the court on the Plea in Abatement without prejudice to the rights of any of the parties, the following proceedings were had: "John M. Burt, called for the United States, being duly sworn, testified as follows: Direct examination. I am an investigator in the Bureau of Investigation, Department of Justice, and I was such on January 9, 1933, and prior thereto. On or about January

9, 1933, I made an investigation of the premises known as 60 Brady Street. On that day investigator Goggin told me in the presence of investigator De Kalb that he had gotten information that a distillery was in operation at said premises. At 4:30 P. M. on that day the three of us proceeded to the vicinity of that address and observed a strong odor of fermenting mash and distillation in the vicinity; that odor was traced to 60 Brady Street. The Court: When you say "traced" you mean you approached the premises and determined to your satisfaction the odor came from them? A. Yes. Standing at the door of No. 60 Brady Street I could hear the roar of a gas burner and the hum of motors inside, and then observed the odor of distillation. Q. Where were you standing when you heard the hum of the motors? A. On the sidewalk in front of 60 Brady Street. Investigator Goggin slid back the front door, which was not fastened. Be- [69] fore doing so we had observed the odor of fermenting mash, and there was a sign up over one of the doors indicating that a drayage company was operating in there. We looked in through the glass and saw no drays— Q. How near the sidewalk was that? A. We were on the sidewalk at the time. Q. How far away did you look through? A. This was right on the sidewalk. We could see in about 20 or 25 feet back from the front what appeared to be a newly erected partition, and through one small aperture at the top of that partition I saw a light coming through and I saw what appeared to be the top of a large

door that had been cut in the partition, but was concealed all but about six inches by a large pile of pasteboard cartons. There were truck tracks running back along that pile of cartons apparently through that doorway. Investigator Goggin then slid back this door, which was not fastened, and we entered the building. Q. Just stop there for a minute. You had smelled what you thought was fermenting mash? A. Yes. Q. You had heard the hum of motors? A. Yes. Q. Had you heard any sound indicating anybody was present on the premises? A. No. Q. Proceed. A. In this partition was another small door which Investigator Goggin opened, it being unfastened, and we entered the rear part of the premises. We there saw a man standing by an alcohol receiving tank drawing alcohol into a five-gallon can, and a large alcohol distillery in full operation, full of mash and sacks of sugar. He was placed under arrest. He gave the name of Ferrari. Investigator De Kalb remained in the still room with him and Investigator Goggin and myself went out in the front part, it was dark, and sat down. At 6 p. m. we heard this noise on the lock of the door, the door opened, and a man entered and proceeded toward the small door in the partition, and we stepped out and placed him [70] under arrest. He had in his possession the key which fitted the lock on the front door. His name was Silvio Cappi. Investigators De Kalb and Goggin proceeded with the two prisoners, after questioning them, to the Southern Police Station. At 8:10 p. m., it being now quite dark, I was in the

front part of the building, had left an electrical blower or fan in operation near the front of the building, and the lights turned on, and I went out in front in the darkened front portion, and at 8:10 p. m. I heard on the sidewalk on the outside the side of a key being inserted in the lock, I heard the door opened and closed, and a man stepped down into the main part of the building and started toward the rear, at which time I placed him under arrest, and told him to come on back to the still room. He went back through the same small door which I had to use, finding his way in there in the dark. After we had entered he asked me if I really was a prohibition agent, and I told him that I was, and showed him my credentials, and I then made a search of his person and found on him a number of papers bearing the name of Antonio Rocchia. I asked him if Rocchia was his real name and he told me it was. Some of these papers gave me reason to believe that he was the owner of this distillery, and had also on his person \$1600 in currency with which he attempted to buy his release, and he had in his pocket the key, which was subsequently removed by Investigator Goggin, and which also fitted the lock on the front door. Upon the return of Investigators Goggin and De Kalb the defendant was questioned and then gave the name of John Caruso. He denied connection with the still, and would not make any admissions, whatever. We were in almost constant conversation for a matter of two hours; he made a great many statements at that time, and one to the effect that if I let him go at that



time [71] he would set up another distillery and pay me regularly, and also introduce me to one or two other men who would also pay me. He did not admit ownership of the still or any connection with it. The Court: As I understand, the door was not locked? A. No. Q. It did not have to be opened by the handle of the door? A. It had to be slid open. Q. It was not locked? A. No. Q. But the door was actually closed and you had to slide it open? A. Yes. Q. And you had no warrant? A. No. Cross Examination. The door through which the defendant Rocchia came was not the same door that Goggin slid open. There are two doors to 60 Brady Street; one is a large driveway door and the other is a small door. The small door is on the righthand side as you face the building. That is the first door which Rocchia came through. As you enter that small *dor* there is a flight of steps leading upstairs directly ahead and directly to the left there is another door leading into the front part of the building. Then at the back of that room is the *partition* that I spoke about with a doorway into the still room. All but the top of the driveway door in that partition was covered by cartons stocked in front of that partition. They were all empty and had light wooden framework built around them so that they could be slid to one side, which disclosed this driveway through the partition. When the defendant Rocchia came to 60 Brady Street he came through the small door that leads into the small room. At that time I was in the large room. You could call it the store room in



front of the still room. I testified in this matter before the United States Commissioner. Mr. Hatfield: I want you to take a look at page 2, here, and I will ask you whether or not you gave that testimony at that time. A. Yes. Q. In other words, before, when you were [72] testifying, you said that 'At 8:10 p. m. I was out in front of the building and saw a fellow walking up on the sidewalk outside, heard the footsteps, and heard the footsteps stop at the same door where Cappi had entered.' Did you give that testimony? A. I certainly cannot recall saying that I saw him walk up—I as out in the front part of the building. Q. You did not say you were in the *frong* part of the building, you say you were in the front of the building. A. It was not my intention to give any such testimony as that, I was in the front part of the building. If I had been on the outside part of the building I would have seen him. Q. Whereabouts were you? A. I was in the front part of the building. At that time the building was divided into a large room at the rear which was used for the still, and the front part of the building was divided up by a partition into two small rooms. Both of these rooms were in front of the still room. In addition there was a little ante room through which the door led, that these men came in through. When Rocchia came in I was standing in the small front room which was on the righthand side of the building as you stand facing the building. That is the room in front of the still room. Mr. Hatfield: Q. So if

you testified you were out in front of the building you testified to something that was not correct? A. If I testified I was out on the sidewalk I testified to something that was not correct. Q. After you testified I cross-examined you, and I will ask you whether you did not testify you were on the stairs going up into the mezzanine. A. No. Q. You are quite sure of that? A. Yes. Q. Now, I will ask you to read your testimony there that you gave under cross-examination, and ask you whether you answered those questions or not. A. This is absolutely not my testimony. I was on the way to those [73] stairs to go up on the mezzanine floor. Q. Then it is not your testimony at this time, you did not testify in reply to my question, 'At what time did the defendant Caruso arrive? A. At 8:10 p. m. Q. By that time the other agents had left and you were alone there: Is that correct? A. Yes. Q. And you were standing out in front? A. I was standing just in the stairs that lead up to the mezzanine floor.' You did not testify to that? A. I do not recall any such testimony, no. Q. You are positive that you did not testify to that? A. I am quite positive that I did not. Q. In other words, that is something that you did not say, and if the reporter took it down it is not the truth? A. Yes. I was on my way to the stairs, but what my exact words were at the time I do not recall. The Court. Is there any question but that it is a true transcript? Mr. Goulden: I have never seen it, I did not even know there was a transcript. Mr. Hatfield: There is a

stairway leading to the mezzanine floor, is there not? A. Yes. "Witness continuing: When De Kalk and Goggin and I got to the premises we did not go around that, around in back; we were in the first street intersecting Brady Street which would put *is* in a way inside of the building and to rear of it; were not directly to the rear of the building. The building does not run through one street to the other street, there. I did not go to the back of the premises at all. We were not close up against the back of the building. We were in this intersecting street where we could see the rear of the building. Before I entered that place I did not see or hear anyone in the place. I just heard the burners. I did not make any attempt to get a search warrant. It was our information there would be a change in the situation if we took the time to get a search warrant. It was 4:30 in the afternoon. [74] Cappi got there about 6:00 o'clock. The search of the premises was completed around 11:00 o'clock that night. The search had not been completed at the time Cappi got there. Mr. Hatfield: You testified in this case before the Commissioner, didn't you? A. Yes. Did you say one word about any money being offered you before the Commissioner? A. I had no opportunity to give any testimony whatever about any money. Q. You did not have any opportunity? A. No."

AND BE IT FURTHER REMEMBERED, that thereafter, towit, on February 2, 1934, prior to the ruling of said court on said Plea in abatement and motion to suppress the said defendant Antonio Roc-

chia subscribed to and filed a verified amended plea in abatement and motion to suppress documents and evidence taken at the time of his arrest upon the ground that said taking was in violation of the constitutional rights of the defendant, particularly as respects the Fourth and Fifth Amendments to said Constitution; that after hearing and consideration of said motion as amended the same was by the court denied and an exception was thereunto duly and regularly by said defendant taken. Said amended plea in abatement is not part of this appeal and the motion to suppress evidence as amended was, in the words and figures following, towit:

“(Title of Court and Cause.)

“AMENDED PLEA IN ABATEMENT AND  
MOTION TO SUPPRESS EVIDENCE.

“Pursuant to order of court first had and obtained to file this Amended Plea in Abatement and Motion to Suppress Evidence, now comes ANTONIO ROCCHIA, one of the defendants above named and pleads in abatement of the indictment on file in the above entitled matter and to each and every one of the several separate counts therein contained, and moves to suppress evidence, and in that behalf alleges as follows:

“That on or about January 9, 1933, certain Federal Pro- [75] hibition Agents, towit: John N. Burt, William P. Goggins and Keith De Kolb, without observing the commission of any offense in their presence and without a search warrant au-

thorizing the search of the premises hereinafter referred to, and without a warrant for the arrest of the defendants or any of them or any other person, entered and searched the premises located at 60 Brady Street, San Francisco, California, and obtained therein certain knowledge and information. That thereafter and on or about the 9th day of January 1933 said prohibition agents without observing the commission of any crime by the defendant Antonio Rocchia and without having probable cause to believe that the defendant Antonio Rocchia was committing or had committed a felony or any other crime, arrested Antonio Rocchia and at said time said agents did not have grounds for the arrest of Antonio Rocchia. That as a result of the search of said premises said officers found certain properties which they seized. That said properties so seized as aforesaid was the property of the defendant Antonio Rocchia and was in the possession of Antonio Rocchia at the time the same was seized as aforesaid. That as a result of the arrest of said Antonio Rocchia, said officers found certain property, papers and effects in the possession of said Antonio Rocchia which they seized. That the entry, search and seizure, as aforesaid, were and each of them was and is illegal and in violation of the rights of Antonio Rocchia under the Fourth and Fifth Amendments to the Constitution of the United States. That said property so seized, as aforesaid, was the property of the defendant Antonio Rocchia and was in the possession of Antonio Rocchia at the time of its seizure.



“WHEREFORE, petitioner prays that the searches and seizures be set aside and be declared null and void and the Court order [76] and direct the United States Marshal, Clerk and Federal Prohibition Officers to suppress and exclude from evidence any property so seized by reason of said illegal search from the trial of said cause, as well as all knowledge derived from their seizure be excluded from evidence and entirely suppressed, and that said proceedings be abated.

“ANTONIO ROCCHIA

Petitioner

“GEO. J. HATFIELD

Attorney for Petitioner.

“BY STIPULATION AND GOOD CAUSE APPEARING THEREFOR it is hereby ordered that the defendant Antonio Rocchia, may file the foregoing AMENDED PLEA IN ABATEMENT AND MOTION TO SUPPRESS EVIDENCE.

“HAROLD LOUDERBACK,

Judge

State of California,  
City and County of San Francisco.—ss.

“ANTONIO ROCCHIA, being first duly sworn, deposes and says:

“That affiant is the petitioner named in and making the above and foregoing AMENDED PLEA IN ABATEMENT AND MOTION TO



SUPPRESS EVIDENCE; that affiant has read said Amended Plea in Abatement and Motion to Suppress Evidence and knows the contents thereof; that the same is true of affiant's own knowledge except as to matters which are therein stated upon information and belief and that as to those matters affiant believes it to be true.

“ANTONIO ROCCHIA

Subscribed and sworn to before me this 30th day of January, 1933.

MAUDE REYNOLDS

Notary Public in and for the City and County of San Francisco, State of California. My commission expires June 23, 1934.

(Seal) [77]

(ENDORSED: “No. 24941-L IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. UNITED STATES OF AMERICA, Plaintiff, v. FRANK FERRARI, SILVIO CAPPI and ANTONIO ROCCHIA, Defendants. AMENDED PLEA IN ABATEMENT AND MOTION TO SUPPRESS EVIDENCE. FILED FEB-2 1934 WALTER B. MALING, Clerk. GEO. J. HATFIELD, ESQ., Attorney at Law, 333 Montgomery St., San Francisco, California.”)

Thereafter and on February 3, 1934, and in the absence of the attorneys for both parties, the court entered its order that the Motion to Suppress as

amended having been heretofore submitted, and due consideration having been thereon made, it is further ordered that said Motion to Suppress Evidence as amended be and the same is hereby denied, and an exception was duly and regularly taken thereto by said defendant.

AND BE IT FURTHER REMEMBERED, that thereafter and on February 10, 1934 said defendant Antonio Rocchia pleaded not guilty to said indictment; that said defendant was called for trial on said indictment on Tuesday, June 26, 1934. That said indictment came on for trial on the date aforesaid before the Honorable Harold Louderback, District Judge of said court, the United States being represented by Thomas G. Goulden, Esq. and Valentine C. Hammack, Esq., Assistant United States Attorneys, and the defendant Antonio Rocchia being represented by Frank J. Perry, Esq., and the following proceedings were had.

Thereupon, the jury having been sworn to try the case, Thomas G. Goulden, Esq., Assistant United States Attorney, made an opening statement of the case to the jury as to the matters the United States expected to prove, whereupon the following proceedings were had.

MR. GOULDEN: I desire to read from a portion of the Amended Plea in Abatement and Petition to Suppress Evidence. [78] It was filed February 2, 1934. It is signed by Antonio Rocchia and subscribed and sworn to before Maude Reynolds, January 30, 1933.

MR. PERRY: I admit the signature of Antonio Rocchia on that document. I object to it upon the ground that that document is an *ex parte* document. Counsel is seeking to read it into evidence as part of his case. I object to it on that ground.

THE COURT: Any statement made by a person, whether under oath or not, that is, by a defendant on trial, may be received as against him. You have conceded that the signature is his. It is to be presumed that he signed it with the idea in mind of proving what the document sets forth. I think it is admissible for such weight as the jury may desire to give to it.

THE COURT: It will be received as government's Exhibit No. 1 for identification. (The document was marked "U. S. Exhibit 1 for identification").

MR. PERRY: I wish to reserve an exception.

MR. GOULDEN: (Reading from amended motion to suppress) That as a result of the search of said premises said officers found certain properties which they seized. That said properties so seized as aforesaid was the property of the defendant Antonio Rocchia and was in the possession of Antonio Rocchia at the time the same were seized as aforesaid. That as a result of the arrest of said Antonio Rocchia said officers found certain property, papers and effects in the possession of said Antonio Rocchia, which they seized.

## (EXCEPTION NO. 1.)

TESTIMONY OF KEITH DE KALB, For the Government.

KEITH DE KALB, called for the United States, being duly sworn, testified as follows: [79]

## DIRECT EXAMINATION

I reside in the City of San Francisco. I am an investigator in the Alcohol Tax Unit, Bureau of Internal Revenue. I have been employed by the Federal Government for a little over six years. At the present time I am an investigator in the Alcohol Tax Unit. Prior to about three months ago I was an investigator in the Prohibition Unit of the Department of Justice. My first experience in Government Service was an inspector in the United States Border Patrol. On January 9, 1933 I was an investigator in the Bureau of Prohibition. On that day, in company with Inspectors Burt and Goggin, I visited the premises 60 Brady Street, San Francisco. Inspector Goggin had information to the effect that there was a distillery in operation at that place. Prior to this time I had made investigations and seizures and arrests concerning stills unlawfully in operation. When I visited the premises at 60 Brady Street on this day we detected a strong odor of distillation and of fermenting mash in the street in front of the building. Brady street runs from Market street to Otis street; it is near the intersection of Van Ness Avenue, or South Van Ness Avenue, rather, and Mission Streets. It is a narrow

(Testimony of Keith De Kalb.)

street. We approached the main doorway to the building. We could hear the sound of burners, blowers, etc. inside of the building. We could look through the front door of the building, which was glass in its upper portion; it was a sliding door with glass in the upper half. We could see inside a partition some thirty feet back of the door and a large pile of cartons against the partition; there were truck tracks running from the front door in front of which we were standing to the pile of cartons and disappearing under the pile of cartons. By truck tracks I mean large tire tracks. [80]

Q Did you receive any further indications while you were in that position, that there might be a still in the premises, or that the information you received was correct? A I have mentioned the smell and the sound, and these tracks. Q What was the sound that you heard? A. It was a roaring sound, a sound that is common to a gas burner when it is operating under pressure. Stills are usually operated in this vicinity by gas burners, the heat is supplied that way. The building was a concrete building. In the front it carried a sign indicating there was some kind of a drayage business conducted there. The building had a front of about 50 feet and was approximately 100 feet deep. There was no sign on the building, at all, to indicate that the business engaged in that building might be a distillery.

MR. GOULDEN: Q Then what did you do? A Investigator Goggin opened the door——

MR. PERRY: Just a moment. I am going to object, your Honor, to any further testimony as to

(Testimony of Keith De Kalb.)

what happened after the agents looked into the building, upon the ground that it violates the Fourth and Fifth Amendments to the Constitution of the United States.

MR. GOULDEN: This matter of search has all been disposed of and it is too late at this time to make any mention of the legality or the illegality of the search.

MR. PERRY: For the purpose of the record I am renewing my objection.

THE COURT: Q What did you observe before you went in there? A We detected the odor of fermenting mash and distillation, which is distinctly different. We heard the sound of the burner in the plant. We could see a partition dividing the building crosswise; in front of this partition was a pile of cartons; there [81] was a pair of large tire tracks which went from the front door and disappeared directly under this pile of cartons.

Q Did you hear any other sound? A Other than the sound of the motors and burners, no, sir.

Q You did not hear anything that indicated that anybody was in there? A The sound of the motors and burners in operation.

Q You didn't see anything that indicated to you that anybody was in there; you heard no rattling of cans, did you? A No, sir. Q No people moving about? A No, sir; the other noise was so great that you could not hear anything else.

Q Was the door open? A It was open about an inch. It was a door that opened in three sections. It was not jammed all the way shut.



(Testimony of Keith De Kalb.)

THE COURT: The objection will be overruled.

MR. PERRY: Exception.

MR. GOULDEN: Q As I understood it, then you entered the building? A Yes.

MR. PERRY: I would like to make this suggestion. I would like to have the objection I have just made, as violating the constitutional rights of this defendant, particularly as respects the Fourth and Fifth Amendments to the Constitution, follow throughout this entire line of testimony.

THE COURT: I think it is necessary for you to make the objection each time you wish it on the record, Mr. Perry.

WITNESS (Continuing) Inspectors Burt and Goggin entered the premises with me. We went through the first room and took a door to the left. I may say that the partition which went crosswise of the building was——

MR. PERRY: Just a moment. I am going to object to the testimony as to anything inside the building, as far as the par- [82] tition goes, upon the ground that it violates the Fourth and Fifth Amendments to the Constitution so far as this defendant is concerned.

THE COURT: The same ruling.

MR. PERRY: Exception.

(EXCEPTION NO. 2.)

WITNESS (Continuing): The front part of the building, which is partitioned off by the partition which I have mentioned, is also divided by another

(Testimony of Keith De Kalb.)

partition, making two rooms. The room which we entered through the garage door is the larger of the two rooms and to the right as we face the building. We took a door leading into the other room which is to the left as we face the building; in that room we passed through a door that led to the back of the building. I identify this plan that I am now shown as a diagram of the floor plan of the building at 60 Brady Street at the time the distillery was in it. I prepared that diagram, myself. I can mark the door we went through with the figure "1" and then proceed and enumerate the various doors we went through.

MR. PERRY: I am going to object to any testimony the witness might give, either with respect to the diagram he has in his hand or to what he did when he went inside the still room, upon the ground that it violates the defendant's constitutional rights, particularly as respects the Fourth and Fifth Amendments.

THE COURT: Objection overruled.

MR. PERRY: Exception.

WITNESS (Continuing): This is a correct diagram to the best of my recollection of the premises. It is not to scale [83] but it indicates absolutely the general floor plan. I have marked the doors 1, 2, and 3; 1 being the first door through which we entered, 2 being the second door, and 3 being the third door. The second door is the door that leads into the room immediately to the left of the garage door as we enter. We then proceeded through a

(Testimony of Keith De Kalb.)

door in the back wall there and that permitted us to enter the still room proper. That door that I refer to is marked Door 3.

(EXCEPTION NO. 3)

MR. GOULDEN: Q What did you find in the still room as shown on the diagram there? (Government's Exhibit No. 1 in evidence)

MR. PERRY: I object to the witness testifying to anything he found in the still room upon the ground that it violates the defendant's constitutional rights, particularly with respect to the Fourth and Fifth Amendments to the Constitution.

THE COURT: The same ruling.

MR. PERRY: Exception.

WITNESS (Continuing): We found a distillery that was producing between 500 and 1000 gallons of alcohol a day. There were some 30,000 gallons of corn sugar mash, a 500-gallon still, and a 250-gallon still, and over 1000 gallons of alcohol and whiskey. The man who was in charge of the premises at that time we arrested; he gave the name of Ferrari. We entered there about 4:30 o'clock in the afternoon, of January 9, 1934. We arrested him immediately and we questioned him and we searched him.

(EXCEPTION NO. 4)

MR. GOULDEN: Q What did you find when you searched the [84] defendant Ferrari?

MR. PERRY: I make the same objection that I just previously made for the purpose of the

(Testimony of Keith De Kalb.)

record, your Honor. Will there be the same ruling? I will make the objection this way, your Honor: I object to any statements to be given by this witness with respect to the last question propounded to him on the ground that it violates the defendant's constitutional rights, particularly with respect to the Fourth and Fifth Amendments to the Constitution.

THE COURT: Q You arrested the defendant right there? A Yes. Q Right in the still house? A Yes; this was Frank Ferrari.

THE COURT: The objection will be overruled.

MR. PERRY: Exception.

WITNESS (Continuing) We found on his person a key which fitted the front door of the building; (U. S. Exhibit No. 2 for identification and later as U. S. Exhibit No. e in evidence)

(EXCEPTION NO. 5)

WITNESS (Continuing) That door is to the extreme right of the building as one enters the building; I am marking it here on the diagram as No. 4. I fitted that key to the lock in the door and it fitted the lock and it could unlock that lock in the front door. This key that you show me resembles the key which was taken from the defendant Ferrari; I did not keep that key in my possession all the time, and I cannot recall from memory the exact detail of that particular key. Investigator Burt kept the key which was taken from Ferrari.

(Testimony of Keith De Kalb.)

MR. GOULDEN: May I introduce the diagram in evidence, your Honor, as Government's Exhibit next in order? [85]

MR. PERRY: We object to the document being received in evidence upon the ground that it violates the defendant's constitutional rights, particularly as respects the Fourth and Fifth Amendments.

THE COURT: Objection overruled. It will be received as Government's Exhibit 1.

MR. PERRY: Exception.

(The diagram was marked U. S. Exhibit 1.)

MR. GOULDEN: And may I place the key in evidence as an exhibit for identification?

THE COURT: Government's Exhibit No. 2 for identification.

(The key was marked "U. S. Exhibit No. 2 for identification.")

(EXCEPTION NO. 6)

MR. GOULDEN: Q Did you question Ferrari? A Yes. Q Did he make any statement?

MR. PERRY: I object to the question upon the ground heretofore urged, it violates the defendant's constitutional rights, particularly with respect to the Fourth and Fifth Amendments.

THE COURT: Objection overruled.

MR. PERRY: Exception.

A I am referring now to the original notes I took at the time that I questioned, or, rather, that

(Testimony of Keith De Kalb.)

Ferrari was questioned. At that time we asked him——

MR. PERRY: Just a moment, I object to this.

THE COURT: This will apply to the conspiracy count solely, as far as this particular defendant is concerned. That is the seventh count in Indictment No. 24941-L. It will be received against the defendant on that count solely.

A He stated that he did not know who the still and the liquor belonged to, that he had been operating the plant for two days. [86] As I recall it, he made no other statements.

WITNESS (continuing) I stayed in the still room with this defendant Ferrari; the other agents who were with me left this room going out the front door. About six o'clock they came back to the building, returned to the still room bringing with them a man who when questioned gave the name of Silvio Cappi. This man was searched and questioned. He had in his possession a key which was a duplicate of the key which was in the possession of Ferrari.

MR. GOULDEN: Q I show you what purports to be a key and ask you if you have ever seen it before.

MR. PERRY: I object to any testimony in respect to it upon the grounds heretofore urged, it violates the Fourth and Fifth Amendments to the Constitution so far as the constitutional rights of the defendant Rocchia are concerned.



(Testimony of Keith De Kalb.)

THE COURT: The objection will be overruled.

MR. PERRY: Exception.

WITNESS (Continuing): This key I can come more nearly saying it is the same key, because at the time the key was in my possession I noticed the fact that it was a duplicate, it had been made by S. Orioli; however, I cannot say absolutely that that is exactly the same key taken off his person.

(The key was here marked "U. S. Exhibit 3 for identification," and later received as U. S. Exhibit No. 5 in evidence)

WITNESS (continuing) The key was turned over to Inspector Burt. Investigator Goggin and myself took the prisoners out of the building between 6:30 and 7:00 o'clock and took them up to our office and finger-printed them and took them down to the police station and booked them for violations of the Internal Revenue Law. Inspector Burt remained in the still room. to retain custody over the seizure. [87]

(EXCEPTION NO. 7)

WITNESS (continuing) At about ten o'clock in the evening Investigator Goggin and myself returned to the still building. At that time Investigator Burt was in the still room and had in his custody this defendant, Antonio Rocchia, who at that time gave his name as John Caruso. At that time Investigator Goggin and Investigator Burt, the defendant Antonio Rocchia and myself were the only ones present in the building.

(Testimony of Keith De Kalb.)

MR. GOULDEN: Q What transpired next?

A Investigator Goggin made the remark——

MR. PERRY: Just a moment. I am going to object to anything that may have transpired at this time upon the ground that it violates the constitutional rights of the defendant Antonio Rocchia, particularly as respects the Fourth and Fifth Amendments to the Constitution.

THE COURT: Q This was in the presence of the defendant on trial? A Yes.

THE COURT: The objection will be overruled.

MR. PERRY: Exception.

WITNESS (Continuing): Investigator Goggin, as I recall it, stated to Investigator Burt, "It looks like you have got the big shot." Investigator Burt said, "I have." or something to that effect. Investigator Burt said, "Search him and see what you find." The defendant Rocchia did not make any comments at this time, he stood mute.

(EXCEPTION NO. 8)

MR. GOULDEN: Q What did you do?

MR. PERRY: I object to anything this witness may have done in that respect, on the ground that it violates the constitutional rights of the defendant on trial, particularly with respect to [88] the Fourth and Fifth Amendments.

THE COURT: Q He was under arrest at the time, was he not? A Yes.

THE COURT: The objection will be overruled.

MR. PERRY: Exception.

(Testimony of Keith De Kalb.)

WITNESS (continuing): I searched the defendant and found in his inside coat pocket a long wallet in which there was a quantity of money. I counted this money and there was \$1600, in currency. I counted this money on the floor. Investigator Goggin found in the defendant's pocket another key which matched the two keys he had already taken from the other two defendants. Investigator Goggin found that key in the coat pocket of Rocchia. We compared the three keys. I satisfied myself that that key was a key similar to those that have been presented here for identification as Government's Exhibits 2 and 3, the other two keys. (Later received in evidence as U. S. Exhibits Nos. 4 and 5 respectively.)

(EXCEPTION NO. 9)

WITNESS (continuing) In the presence of the defendant Investigator Goggin asked Investigator Burt if the defendant had not offered him the money for the purpose of securing his liberty, and Investigator Burt stated that he had, and humorously stated that it was a very tempting offer. The defendant did not say anything at that time.

MR. PERRY: If your Honor please, I wish to make an objection to that particular item of testimony just given upon the ground that it violates the defendant's constitutional rights, particularly as respects the Fourth and Fifth Amendments.

THE COURT: Objection overruled.

MR. PERRY: Exception. [89]

(Testimony of Keith De Kalb.)

(EXCEPTION NO. 10)

MR. GOULDEN: Q Was anything further found on the person of Rocchia?

MR. PERRY: The same objection to that, your Honor.

THE COURT: The objection will be overruled.

MR. PERRY: Exception.

A Investigator Burt displayed some papers which he had already taken from the defendant and stated that he found them on the defendant's person. (U. S. exhibits Nos. 5 and 6 and later received as Nos. 7 and 8 in evidence.)

(EXCEPTION NO. 11)

MR. GOULDEN: Q Did you see these papers?  
A Yes. Q Did you examine them? A Yes.  
Q In a general way, what were these papers?

MR. PERRY: I object to any testimony by this witness, testifying in a general way, or in any way, with respect to the papers, upon the ground, first, that the original papers, themselves, are the best evidence; upon the second ground that it violates the constitutional rights of the defendant, particularly as respects the Fourth and Fifth Amendments to the Constitution; upon the third ground——

THE COURT: What is the situation regarding these papers?

MR. PERRY: Upon the third ground that an order of the Court has already been made directing the return of the papers to the defendant. I wish

(Testimony of Keith De Kalb.)

at the same time, as part of the objection, to offer in evidence the record before the United States Commissioner, his Docket No. 3142, and particularly the documents—the complaint filed before the Commissioner, the order of Judge Kerrigan directing the return of certain documents, [90] and the bond of the defendant on trial. (Defendant's Exhibit #1 for identification)

MR. GOULDEN: I don't see the relevancy of this offer. There is nothing here that has any connection with this case. There is nothing to show any ruling was made on the so-called petition for exclusion. On that ground I object to it as entirely immaterial, *irrelevant*, and incompetent.

MR. PERRY: In that particular respect I wish to say that the matter was presented to the United States Commissioner, a motion to suppress was filed before the United States Commissioner, and the case was dismissed as to the defendant Rocchia on trial here.

THE COURT: Where is the petition upon which this is predicated?

MR. PERRY: That is a petition for the exclusion of evidence and the notice of motion.

THE COURT: I want the petition in No. 3142.

MR. PERRY: This is it, your honor. I will make it part of the same record. So there will be no confusion in the record your Honor, I wish to say that the case that was pending before the United States Commissioner was dismissed as to the defendant Rocchia.

(Testimony of Keith De Kalb.)

THE COURT: Let me ask counsel for the Government, are you intending to put in evidence any property which was returned by this Court to the defendant?

MR. GOULDEN: I intend to put in evidence, your Honor, exact photographs of these documents. The documents are in the possession of the defendant by an order of the Court. Under the well-known rules of evidence, where the evidence is in the particular and the peculiar custody of the other side, secondary evidence is permissible. [91]

THE COURT: That is not my point. Is this property which was covered by the order of Judge Kerrigan requiring its return to this defendant, are you contemplating offering that? Are you going to make any collateral attack on that order?

MR. GOULDEN: I don't know whether that order is subject to collateral attack at the present time, or not. It reads that a motion to suppress has been granted. Undoubtedly that was the reason for the court signing the order. The fact is that no motion to suppress had been granted. I have the word of the Commissioner, himself, on that, and he has filed an affidavit.

MR. PERRY: Counsel is giving testimony now, your Honor. The question your Honor asked counsel was whether or not any of the documents that were ordered returned by Judge Kerrigan were to be used on this trial. I understood that was the question your Honor asked counsel.

THE COURT: Of course, I think that the whole situation comes down to this, that the Court is to



(Testimony of Keith De Kalb.)

pass upon the legality of the arrest of this defendant, and that has not been presented to the Court as yet.

MR. GOULDEN: That has been presented to your Honor so far as the search and seizure were concerned. That has been presented to and passed upon by your Honor.

THE COURT: I do not at this time recall the facts.

MR. GOULDEN: It was submitted to your Honor both on oral arguments and on briefs.

THE COURT: I think you should produce the circumstances of his arrest here, just how it occurred. I do not recall those circumstances. This order is predicated on the supposed action of the Commissioner.

MR. GOULDEN: Yes. The commissioner has filed an affidavit [92] telling exactly what happened. He will testify, if required.

THE COURT: You expect to produce that testimony before the trial is over?

MR. GOULDEN: Yes. I could not anticipate whether it was going to be necessary, or not.

THE COURT: Under that assurance I will at this time overrule the objection of counsel.

MR. PERRY: So that there is not any confusion, if your Honor please, I made an offer of these documents in evidence. For the purpose of the record, and protecting the record, I would like to have them received in evidence. (Defendants Exhibit No. 1 for identification.)

(Testimony of Keith De Kalb.)

THE COURT: I will receive them for identification.

MR. PERRY: Your Honor, do I understand by that that they are not to be received in evidence? I am making the offer in evidence and not for identification.

THE COURT: They will be received for identification only.

MR. PERRY: Note an exception.

(The documents were marked "Defendant's Exhibit 1 for identification.

Said petition for exclusion of evidence and return of property signed by said Antonio Rocchia and filed before the United States Commissioner Ernest E. Williams and order of Frank H. Kerrigan for return of personal property read in full as follows:

Defendant's Exhibit for identification No. 1:

"IN THE UNITED STATES DISTRICT COURT  
OF THE UNITED STATES IN AND FOR  
THE SOUTHERN DIVISION OF THE  
NORTHERN DISTRICT OF CALIFOR-  
NIA.

"BEFORE United States Commissioner Ernest E. Williams. [93]

No. 3142

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

JOHN CARUSO,

Defendant.

“PETITION FOR EXCLUSION OF EVIDENCE AND RETURN OF PROPERTY

“That on or about January 9, 1933 certain Federal Prohibition Agents without observing the commission of any crime by your Petitioner and without having probable cause to believe that your Petitioner was committing or had committed a felony, arrested your Petitioner and at said time said agents did not have grounds for the arrest of your Petitioner.

“That on said date said Prohibition Agents searched the premises located at 60 Brady Street, San Francisco, California, and obtained therein certain knowledge and information.

“That said officers did not witness the commission of any offense in their presence, nor did they have a warrant for the arrest of your Petitioner, or any other person, nor did they have a search warrant authorizing the search of said premises.

“That as a result of the search of said premises said officers found certain property which they seized.

“That the search and seizure as aforesaid was and is illegal and in violation of your Petitioner’s rights under the Fourth and Fifth Amendments to the Constitution of the United States.

“That your Petitioner is informed and believes and therefore alleges that the United States Attorney for the Northern District of California proposes to use the property or evidence seized as aforesaid against your Petitioner and to confiscate

[94] "said property so seized as aforesaid and unless the same is suppressed and excluded and returned your Petitioner's rights as aforesaid will have been violated.

"That said property so seized as aforesaid was the property of your petitioner and was in the possession of your Petitioner at the time of its seizure.

"WHEREFORE, your Petitioner prays that the United States Attorney, Marshal, Clerk, Federal Prohibition Officer, by whatsoever *named* called, the Commissioner of Internal Revenue, his agents, assistants and inspectors, be notified that the Court direct and order said United States Attorney and the Officers above mentioned to exclude said property as aforesaid, as well as all knowledge derived from said search and seizure and return the property to your Petitioner so seized as aforesaid not confiscatory by law.

JOHN CARUSO

GEO. J. HATFIELD

Attorney for Petitioner"

“IN THE UNITED STATES DISTRICT COURT  
OF THE UNITED STATES IN AND FOR  
THE SOUTHERN DIVISION OF THE  
NORTHERN DISTRICT OF CALIFOR-  
NIA.

No. 3142

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN CARUSO,

Defendant. [95]

“ORDER FOR RETURN OF PERSONAL  
PROPERTY

“It appearing that on or about January 9th 1933 certain Federal Prohibition Agents arrested the Defendant, John Caruso at 60 Brady Street, San Francisco, California, and at that time and place searched the person of said Defendant, John Caruso, and found certain personal property which they seized consisting of operator’s license, bank check and other personal property.

“That a hearing was had before United States Commissioner Ernest E. Williams on January 25th 1933 to determine the innocence or guilt of said Defendant, John Caruso, relative to his participation in the unlawful operation of a still located at 60 Brady Street, San Francisco, California; that a Petition for the Exclusion of Evidence and Return of Property was filed by John Caruso and said

Commissioner held that the personal property above referred to was unlawfully taken from the person of the Defendant, John Caruso; that the search and seizure were unlawful as to him and the proceedings thereupon dismissed.

“IT IS THEREFORE ORDERED that the personal property consisting of Operator’s license, bank check and other documents taken from the person of the defendant, John Caruso, upon his arrest on January 9th 1933 at 60 Brady Street, San Francisco, California, be returned to him.

“The United States Prohibition Administrator is hereby directed to return said personal property to said defendant, John Caruso.

FRANK H. KERRIGAN

United States District Judge.

Approved:

I. M. PECKHAM

United States Attorney

S. A. A.

Filed Jan. 30, 1933 Walter B. Maling, Clerk  
By \_\_\_\_\_ Deputy Clerk” [96]

The complaint filed before United States Commissioner and a part of said Exhibit No. 1 for identification, was later received as U. S. Exhibit No. 10 in evidence.



(Testimony of Keith De Kalb.)

(EXCEPTION NO. 12)

MR. GOULDEN: Q Do I understand you to testify to having searched the defendant Rocchia?

A Yes.

Q What did you find on the defendant when you made a search of the defendant?

MR. PERRY: For the purpose of the record, your Honor, and in order to preserve the rights of my client, I must object upon the ground that any testimony that this witness is going to give in this particular respect violates the constitutional rights of [97] the defendant, particularly with respect to the Fourth and Fifth Amendments; on the further ground that there was a hearing before the United States Commissioner, a motion to suppress was filed upon the complaint before the Commissioner, and that the case was dismissed before the Commissioner, and an order by Judge Kerrigan was made directing the return of certain papers. (Defendant's Exh. #1 for identification) The testimony that this witness no doubt intends to give now in all probability relates to those documents which were ordered returned. I make that statement as a preliminary statement to my objection. I object on those grounds.

MR. GOULDEN: There is no question the documents were returned. The Government does not make any contention that they were not returned. There is nothing in the order that says they were never seized or that there were no such papers. The

(Testimony of Keith De Kalb.)

Government certainly has the right to show that such papers existed. The order, itself, apparently would show that, but I think we are entitled to show what those papers are.

MR. PERRY: I take an exception to counsel's statement as to the extent of his rights. There is an objection before your Honor.

THE COURT: This court has to decide at this time whether the evidence as such would warrant its reception. I presume that the order was predicated upon certain hearings. I don't know whether you are getting into a situation where you are proposing to offer something that should not be offered. It is only by subsequent testimony that the Court can be satisfied that it was or was not proper. I will have to know, and I do not recall it now if it was ever before me, as to whether this defendant was properly arrested so as to warrant the reception of this evidence.

MR. PERRY: I wish to make the further objection, since your Honor has not ruled at the present time, upon the ground that [98] the documents, themselves, that they took from the defendant, Rocchia, are the best evidence.

MR. GOULDEN: There is no question about that, your Honor, and if the defendant desires to produce them we will be glad to use them.

MR. PERRY: I object to that as an improper remark by counsel.

THE COURT: I think you are inviting trouble on yourself, Mr. Perry. He can demand any docu-

(Testimony of Keith De Kalb.)

ments proper to be introduced by you. If he is demanding them, it is true that he has not gone through the formality of a notice to produce, for instance. Of course, if it is something that should not properly be before the Court that is another situation. So far as I know yet there is nothing to indicate that it was or it was not proper. The defendant was under arrest, and a defendant under arrest can be searched if properly arrested.

MR. PERRY: I want to renew my objection to Mr. Goulden's statement calling upon the defendant to produce certain documents, because it is in effect calling upon him to testify against himself. I assign the remarks of counsel for the Government as prejudicial misconduct, and I instruct your Honor to direct the jury to disregard them.

THE COURT: The Court refuses to receive the instruction.

MR. PERRY: I am sorry I said that word, your Honor, I didn't intend to. I object to counsel's remarks in calling upon the defendant to produce certain documents, because he is in effect calling on him to testify and it is prejudicial misconduct on his part, and I ask your Honor to instruct the jury to disregard the remarks of the United States Attorney.

THE COURT: The objection will be overruled.

MR. PERRY: Exception. [99]

(Testimony of Keith De Kalb.)

(EXCEPTION NO. 13)

MR. GOULDEN: Q Do I understand you to testify to having searched the defendant Rocchia? A. Yes.

Q. What did you find on the defendant when you made a search of the defendant?

MR. PERRY: For the purpose of the record, your Honor, and in order to preserve the rights of my client, I must object upon the ground that any testimony that this witness is going to give in this particular respect violates the constitutional rights of the defendant, particularly with respect to the Fourth and Fifth Amendments; on the further ground that there was a hearing before the United States Commissioner, a motion to suppress was filed upon the complaint before the Commissioner, and that the case was dismissed before the Commissioner, and an order by Judge Kerrigan was made directing the return of certain papers. (Defendant's Exhibit Number 1 for Identification) The testimony that this witness no doubt intends to give now in all probability relates to those documents which were ordered returned. I make that statement as a preliminary statement to my objection. I *objection* on those grounds.

MR. GOULDEN: There is no question the documents were returned. The Government does not make any contention that they were not returned. There is nothing in the order that says

(Testimony of Keith De Kalb.)

they were never seized or that there were no such papers. The Government certainly has the right to show that such papers existed. The order, itself, apparently [100] would show that, but I think we are entitled to show what those papers are.

MR. PERRY: I take an exception to counsel's statement as to the extent of his rights. There is an objection before your Honor.

THE COURT: This court has to decide at this time whether the evidence as such would warrant its reception. I presume that the order was predicated upon certain hearings. I don't know whether you are getting into a situation where you are proposing to offer something that should not be offered. It is only by subsequent testimony that the Court can be satisfied that it was or was not proper. I will have to know, and I do not recall it now if it was ever before me, as to whether this defendant was properly arrested so as to warrant the *receipt* of this evidence.

MR. PERRY: I wish to make the further objection, since your Honor has not ruled at the present time, upon the ground that the documents themselves, that they took from the defendant Rocchia, are the best evidence.

MR. GOULDEN: There is no question about that, your Honor, and if the defendant desires to produce them we will be glad to use them.

MR. PERRY: I object to that as an improper remark by counsel. [101]

(Testimony of Keith De Kalb.)

THE COURT: I think you are inviting trouble on yourself, Mr. Perry. He can demand any documents proper to be introduced by you. If he is demanding them, it is true that he has not gone through the formality of a notice to produce, for instance. Of course, if it is something that should not properly be before the Court that is another situation. So far as I know yet there is nothing to indicate that it was or it was not proper. The defendant was under arrest, and a defendant under arrest can be searched if properly arrested.

MR. PERRY: I want to renew my objection to Mr. Goulden's statement calling upon the defendant to produce certain documents, because it is in effect calling upon him to testify against himself. I assign the remarks of counsel for the Government as prejudicial misconduct, and I instruct your Honor to direct the jury to disregard them.

THE COURT: The Court refused to receive the instruction.

MR. PERRY: I am sorry I said that word, your Honor, I didn't intend to. I object to counsel's remarks in calling upon the defendant to produce certain documents, because he is in effect calling on him to testify and it is prejudicial misconduct on his part, and I ask your Honor to instruct the jury to disregard the remarks of the United States Attorney.

THE COURT: The objection will be overruled.

MR. PERRY: Exception. [102]



(Testimony of Keith De Kalb.)

MR. PERRY: And, furthermore, with all due respect to your Honor, I take an exception to your Honor's remark. Your Honor stated that the Government had the right to call on the defendant by subpoena or otherwise to produce certain documents. I assign the remarks of your Honor as misconduct.

THE COURT: I don't recall any such statement on the part of the Court; I said nothing about a subpoena. If you will examine the record I think you will find that that is in the vaporings of your imagination, Mr. Perry.

MR. PERRY: I ask your Honor to instruct——

THE COURT: You will find that I didn't suggest any subpoena or any other action.

MR. PERRY: You stated he could call on the defendant to produce certain documents.

THE COURT: The objection will be overruled.

MR. PERRY: I take an exception, your Honor, both with respect to the ruling as to Mr. Goulden and also with respect to yourself.

MR. GOULDEN: Q Do you recall the last question:

A You asked me what I found when I searched the defendant Rocchia. I found a wallet containing \$1600 in paper currency and a purse containing some other money. At the time I was searching him and Mr. Goggin was making part of the search we found a key which matched in all respects the keys that had been taken from the other defendants. This key you now show me resembles the

(Testimony of Keith De Kalb.)

key which was taken from the defendant Rocchia in that it has the name of the same manufacturer or the same key maker on it, and is the same general size and shape. I tried the key which was taken from Rocchia as well as trying the keys taken from the other defendants, in that lock and this [103] key operated that lock. The key that was taken from Rocchia operated the lock. This key which I am now shown resembles the key which was taken from the defendant Rocchia; I cannot say that it is exactly the same key. It was delivered to Investigator Burt.

(The key was here marked "U. S. Exhibit 4 for identification," and later received in Evidence and marked U. S. Exhibit No.     ) Nothing further was found on the person of the defendant Rocchia at this time. The amount of money that was in the small purse was something like \$50. I don't know whether I know that because it was counted or because somebody remarked that there was \$50 in it.

(EXCEPTION NO. 14)

MR. GOULDEN: Q Did you see anything further taken or purporting to have been taken from the person of the defendant Rocchia?

WITNESS (continuing): Investigator Burt displayed certain papers which he stated at that time he had taken from the person of the defendant Rocchia——

(Testimony of Keith De Kalb.)

MR. PERRY: Just a moment. The witness answered that before I had an opportunity to object. I object on the same grounds heretofore urged.

THE COURT: The objection will be overruled.

MR. PERRY: Exception.

MR. GOULDEN: Q Did you see these papers? (Government's Exhibits No. 5 and 6 for identification, and later received in evidence as U. S. Exhibit No. 7 & 8)

A Yes. Q Can you tell the Court and jury what these papers were? [104]

MR. PERRY: I am going to object to that on the ground that the papers, themselves, are the best evidence.

THE COURT: You can state what they appeared to be. I don't suppose you can characterize it as any particular legal document, unless it was a legal document, unless it was read.

MR. PERRY: I object to it further on the ground that any testimony he might give in this particular respect violates the defendant's constitutional rights, particularly with respect to the Fourth and Fifth Amendments; and on the ground based upon the previous offer with respect to the records before the United States Commissioner which were received for identification, and marked Defendant's Exhibit No. 1.

THE COURT: Objection overruled.

MR. PERRY: Exception.

(Testimony of Keith De Kalb.)

WITNESS (continuing): There was a list which was written partly in Italian and partly in English. The items ran "Zucchero," and then an item, something like \$250. Yeast \$55. There was an item Carabinieri \$300. There was an item Canne, the amount I don't remember. These were all on one list. The items Zucchero and Yeast were repeated a number of times. There was an item about a carpenter \$25. There was an item indicating the name Fran and an amount of money after it. There were several other items which I do not recall at this time. There was a receipt on a foreign money order showing the name Rocchia. There was a driver's license showing the name of Antonio Rocchia. There were a couple of money orders or deposit slips in the American Trust Company Bank, I believe, showing amounts of money deposited in the name of Rocchia. There was on the bottom of a sales ticket the name of Deneri and a telephone number. There were [105] certain cancelled checks. At this time I do not recall any other items but there were other papers, but I can't remember just what they were. One was a sales slip indicating an amount of sugar that had been sold. Investigator Burt had these papers in his possession, he retained them. I have seen an order of the files, an order of the court, ordering the return of certain papers, but I did not see them returned. I understood from our office the papers had been returned; they are not in the office at the present time. I found in the office duplicates or

(Testimony of Keith De Kalb.)

photographs—purporting to be photographs of the papers. I examined those photographs; they are true representations of the papers given to me by Mr. Burt and said to have been taken by him from the defendant Rocchia.

MR. GOULDEN: Q I show you a group of photographs of papers and ask you if you know what they are.

MR. PERRY: In order to lay the proper foundation, your Honor, I am going to object again to any testimony with respect to documents that he now has in his hands upon the ground that the originals are the best evidence; that there was a hearing before the United States Commissioner involving this same offense; that a motion to suppress was filed at the hearing and that the case was dismissed by the United States Commissioner, and that an order was made by Judge Kerrigan directing the return of certain papers. The record to which I just referred with respect to the hearing before the Commissioner is Defendant's Exhibit 1 for identification. I object to it upon the ground that by virtue of the order issued by Judge Kerrigan it violates the defendant's constitutional rights when he is called upon to give testimony and evidence against himself. I make my objection on that ground, your Honor. [106]

MR. GOULDEN: There is no question about the documents having been returned. I don't know it personally, I was not in the office at that time, but I understand there were. I know there is an order.

(Testimony of Keith De Kalb.)

The order makes no mention of the fact that these exhibits were passed upon by the Court, or that the Court had ever seen them. It is a consent order signed by the counsel, agreed to by the Government's counsel that they must be returned. It inadvertently states that a motion to suppress was granted by the Commissioner. Whether it was or was not is not binding on this Court. We will produce the Commissioner on the witness stand.

THE COURT: Any documents, if there were such documents, cannot be gotten at this time.

MR. GOULDEN: The Government has made no demand, your Honor.

THE COURT: I think the only thing that can be done is to have the witness testify whether this appears to be a copy of the true document taken from the defendant at that time. A All with the exception of these three checks which do not represent anything that were on the person of the defendant were shown to me by Investigator Burt.

MR. PERRY: Your Honor, may we have a ruling on my objection?

THE COURT: You mean the objection made last?

MR. PERRY: Yes, your Honor.

THE COURT: The objection will be overruled.

MR. PERRY: Exception.

THE COURT: Of course, you are right that we cannot get anything from the defendant. You are absolutely correct on that. It would be testifying against himself. There is no doubt but that these



(Testimony of Keith De Kalb.)

photographs can be taken into consideration if they [107] are true photographs of the documents that were upon the person of the defendant at the time which has been testified to.

WITNESS (Continuing) I notice the initials on the back of the photographs and also the date. They are the initials of Investigator Burt. I am familiar with his handwriting. The pencil initials appearing on this particular one are the initials of Sydney Hauptman, who was at that time in charge of the identification office, the identification section of our office, and took the photographs. He is out of the Government Service now and I understand that he is back in Arkansas. I would not know where to get hold of him at this time. These photographs appear to be exact replicas of the originals taken from the person of Mr. Rocchia; they resemble the photographs; I believe they are true photographs of the originals.

(The photographs were here marked U. S. Exhibits 5 and 6 for identification and later received in evidence as U. S. Exhibits Nos. 7 and 8, respectively)

(EXCEPTION NO. 15)

WITNESS (continuing) The defendant was questioned at that time. He stated that he did not know anything about the distillery, that he had been given the key by someone down there on Third Street who had told him that if he went to 60 Brady street and entered this building he might find something in the way of work. It was 6 or 6:30 o'clock

(Testimony of Keith De Kalb.)

when Goggin and I left with the two prisoners, Ferrari and Cappi. I don't know whether it was dark at that time, or not; it was dusk, however. It was the middle of winter. It was dark when we returned to the premises. The defendant Rocchia stated in my presence that [108] he did not know the party who gave him the key. I remained at the still premises all night. Burt and Goggin took the defendant Rocchia away from the premises at about 11 or 11:30 o'clock, I don't remember the exact time. Subsequently to this night I made other investigations concerning this case. I was present at the time a sworn statement was made by Mr. McKee and a sworn statement was made by Mr. Elligeroth. Mr. McKee is a real estate man on Mission street, and Mr. Elligeroth was one of his agents; the statement was taken relative to the renting of [109] these premises on Brady street. I was at the still premises off and on until all of the still equipment was removed. The seizure was turned over to some branch of the Army. On a date shortly subsequent to the seizure I was at the still premises with my wife. We took some pictures in the still room. I took two pictures on the night of the seizure and one picture on the following morning. These three small prints are prints of the picture that I took; these two were taken that night and this one was taken the following morning about daylight. Investigators Goggin and Burt are shown in this picture. They depict the condition as it existed on the night I entered the building, with the exception of the position of cer-

(Testimony of Keith De Kalb.)

tain hoses, I think certain hoses were turned around, and one shows a light that I put down on the floor in order to take the picture. With respect to the vats and the cans of alcohol and the sacks of sugar it is just the same.

MR. GOULDEN: I ask that these three photographs be offered in evidence as Government's Exhibit next in order.

MR. PERRY: I object to these photographs being offered in evidence on the ground that they violate the constitutional rights of the defendant, particularly with respect to the Fourth and Fifth Amendments to the Constitution, by what they portray. They portray what has not been testified by way of evidence.

THE COURT: The objection is overruled; they will be received as Government's Exhibit 2 in evidence. They are received for the purpose of illustration.

MR. PERRY: Exception.

### CROSS EXAMINATION

WITNESS: When Mr. Rocchia, the defendant on trial, arrived at the premises at 60 Brady street I was not there. It was [110] approximately ten o'clock when I saw Rocchia for the first time that night. With respect to the building itself, at 60 Brady street, there are two doors; there is one door on the right-hand side, which is a small door, and there is a door on the left hand side, which is a larger door. The door to which I refer on the left-

(Testimony of Keith De Kalb.)

hand side is, I believe, in about the middle of the building; it is divided into three parts that you can shove back. The large door was not locked. The little door was locked. As I stood at the door I could hear the roaring of the burners. Other machinery makes a roar, too, machinery in other lines of endeavor using burners. There was a sign on the building; I don't remember the exact wording of the sign, but it indicated there was some *sorth* of a drayage business being conducted there; I think it said McCarthy's Drayage, or some such name as that, I don't remember. When I say I counted the money out on the floor, the money which was taken from Rocchia, I mean that I laid it in piles on the floor. There were a great number of piles, there were fives, and tens, and twenties, and, as I recall it there was one \$100 bill. I laid them in piles according to the denominations. There was in the still room, at the end of the still room, toward Brady street.

#### DIRECT EXAMINATION REOPENED

MR. GOULDEN: Does your office take finger prints of men taken into custody? A Yes.

MR. PERRY: I object upon ground that it is incompetent, irrelevant and immaterial whether they take finger prints or not.

MR. GOULDEN: It is preliminary, your Honor, to identifying the cards I have in my hand. These cards carry signatures. One of the proofs here that the government must make [111] is that this defendant signed a lease.

(Testimony of Keith De Kalb.)

THE COURT: You are hoping, in other words, to establish that by finger printing on the card?

MR. GOULDEN: I am hoping to establish it by identifying certain signatures.

WITNESS (continuing) The office keeps a file of those points. The signature is made at the time the finger prints are taken. I identify these two cards, one marked "Case No. 20895," and the other marked "S. F. 24928-F." They are finger prints that were in our file and that I removed a few days ago. I have no personal knowledge of either of those cards other than that I removed them from the files.

(Cards Nos. 20895 and 24927-F here marked U. S. Exhibit 7 for identification, and later Card No. 20895 was received as Exhibit No. 14 of the U. S. in evidence, and card S. F. 24928-F as U. S. Exhibit No. 3 in evidence.)

The government next called William P. Goggin, a government investigator, who had accompanied investigators De Kalb and Burt to 60 Brady Street, and he testified in corroboration of the testimony as aforesaid given by said DeKalb. That the same objections taken to De Kalb's testimony and exceptions to rulings of court thereon were taken to testimony of Goggin and for brevity and condensation of this bill of exceptions are not repeated herein, save and except the following:

(EXCEPTION NO. 16)

MR. GOULDEN: When you say the defendant Tony Rocchia, you mean the man sitting here at the defendant's table? A. Yes.

(Testimony of William P. Goggin.)

THE COURT: Q You mean the man on trial here? A Yes.

MR. GOULDEN: Q Did you have any conversation with Investigator Burt at that time? A Yes, when I entered the prem- [112] ises.

Q Was it in the presence of the defendant? A Yes. Q What was that conversation?

MR. PERRY: I object to anything said by this defendant, or by the agents in the presence of the defendant, upon the ground that it violates the constitutional rights of this defendant, particularly with respect to the Fourth and Fifth Amendments. [113]

THE COURT: Objection overruled.

MR. PERRY: Exception.

A. I Said, "It appears that you have the big shot." Investigator Burt answered saying, "Search him and see for yourself."

(EXCEPTION NO. 17)

MR. GOULDEN: Q Did you search the defendant Rocchia?

MR. PERRY: I am going to assign the remarks of this witness in saying that Rocchia was the big shot as improper on the part of the witness and ask your Honor to instruct the jury to disregard it.

THE COURT: Q At that time nothing was said by the defendant at all, was there? A No, your Honor. Q He stood mute? A Yes, your Honor.

THE COURT: The objection will be overruled.

MR. PERRY: If your Honor please, this witness for the first time came into the room and he



(Testimony of William P. Goggin.)

said, according to his testimony, "It looks like he is the big shot." He never saw the man before. My objection is that any such remark upon the part of the witness is misconduct in making such a statement, and I assign it as such and I ask that the remarks be withdrawn and that the jury be instructed to disregard them.

MR. GOULDEN: The witness was asked what statement he made, or some question to that effect. If that is the statement that was made that is the only answer he can give.

MR. PERRY: This witness could have said anything he pleased when he stepped into that room. It is what the defendant might have said that counts. It is not what this witness could possibly say.

THE COURT: It is a question whether a man has a question directed to him or when things are said that apply to him, it is of moment to know how a man acts or what he says in response thereto. In this case these statements were made in his presence and he did not elect to reply. I will allow it to remain in the record.

MR. PERRY: Exception. [114]

(EXCEPTION NO. 18)

WITNESS AGENT GOGGIN (continuing): Investigator Burt tried the key in the lock of the door at 60 Brady street and it operated the lock. I stayed on the premises for about three quarters of an hour after finding defendant Rocchia present and then left with Investigator Burt to book the defendant

(Testimony of William P. Goggin.)

(Rocchia) at the City Jail. Before we booked him we took him to our office and finger printed him. Government's Exhibit No. 7 for identification (later received as U. S. Exhibit No. 3 in evidence) dated 1-9-33 is the finger print of John Caruso, and is one of the cards. We took three. Investigator Burt took them in my presence.

MR. GOULDEN: Q Whose finger prints are they?

MR. PERRY: That is objected to as being immaterial, irrelevant and incompetent. The United States Attorney stated that he wanted to use the writing or the signature on there as an exemplar. Whose finger prints they are does not make any material difference.

THE COURT: Objection overruled.

MR. PERRY; Exception.

A I saw the finger print made and I saw the finger of the defendant here on trial placed on the card so as to make these [115] imprints. I saw the card signed; it was signed by the defendant Rocchia in my presence. The signature that he placed on there was John Caruso, the name that he gave at the time that he was arrested in the still.

(The card was here marked U. S. Exhibit 3 in evidence.)

WITNESS (continuing): Investigating the case subsequent to January 9, 1933 I visited Mr. Thulin's office, accompanied by Investigator Burt, and secured a copy of the lease from Mr. Thulin. The lease was in the possession of Mr. Thulin at the time

(Testimony of William P. Goggin.)

I visited him. I identify this as the lease I got from Mr. Thulin; I placed my initials on the back of the lease. Investigator Burt was with me at the time and he also put his initials on it.

(The document was here marked U. S. Exhibit 8 for identification.)

In my investigation I also went to Mr. McKee's office on Mission street. I was accompanied by Investigator Burt and Investigator Grant. This was about four or five weeks after the seizure. Investigator Grant got a statement from Mr. McKee. [116]

The government next called John M. Burt, a government investigator who had accompanied investigators DeKalb and Goggin to 60 Brady Street and he testified in corroboration of the testimony as aforesaid given by De Kalb. That the same objections taken to De Kalb's testimony and exceptions to rulings of court thereon were taken to testimony of Burt and for brevity and condensation are not repeated herein save and except the following exceptions:

(EXCEPTION NO. 19)

WITNESS BURT: (

Standing by the alcohol receiving tank was a man who afterwards gave his name as Frank Ferrari. He was searched by investigator De Kalb in my presence. A key was found on him. I don't recall anything else. I identify Government's Exhibit No. 2 for identification as the exact key that was taken from him.

(Testimony of John M. Burt.)

WITNESS BURT (continuing): I am positive that this is the key taken from the defendant Ferrari and not from one of the other defendants because on January 30th of that year (1933) I marked Ferrari's initial on the key. The marking is right here, the letter "F," scratched in the metal. I had kept the keys separately until that time.

MR. GOULDEN: I ask, your Honor, that this key be placed in evidence as Government's Exhibit next in order.

MR. PERRY: I object to it on the ground that it violates the constitutional rights of the defendant Rocchia, particularly as respects the Fourth and Fifth Amendments.

THE COURT: The objection is overruled. It will be received as Government's Exhibit 4 in evidence.

MR. PERRY: Exception.

(The key was marked U. S. Exhibit 4) [117]

(EXCEPTION NO. 20)

WITNESS BURT (continuing): Our entrance into the building on January 9, 1933 was at 4:30 in the afternoon. After the first examination of the still room proper Investigator Goggin and myself left the still room and went into the forepart of the building and concealed ourselves. At six o'clock we heard a key rattling in the lock of the small door and the door opened and closed again; then there came a knocking at a little inner door which leads from the landing at the foot of the stairs into the larger outer room there in front. I am speaking of

(Testimony of John M. Burt.)

Door No. 4. Goggin and I previously had tested that door and it was locked. We also locked door No. 5. We heard the key rattle in the door and the door opened and closed and then came a knocking at this Door No. 5. We were then over in this part and we had to go all the way across here and open the door for him. It was locked and he could not get in. I opened the door and he started to step in and we immediately placed him under arrest. It was defendant Cappi. Government's Exhibit No. 3 for identification (U. S. exhibit No. 5 in evidence) is the key that was found on the person of Cappi. I retained the key in my possession. I scratched the letter "C" in the metal.

MR. GOULDEN: I ask, your Honor, that Government's Exhibit 3 for identification be placed in evidence and marked Government's Exhibit next in order.

THE COURT: Government's Exhibit No. 3 for identification will be received as Government's Exhibit 5 in evidence.

MR. PERRY: I wish at this time to make the objection as regards the constitutional rights of the defendant Rocchia.

THE COURT: Objection overruled. [118]

(EXCEPTION NO. 21)

WITNESS (Continuing): As soon as Cappi had been questioned Investigators Goggin and De Kalb left with Ferrari and Cappi to take them to the prison and book them, leaving me in the custody of

(Testimony of John M. Burt.)

the premises. I remained alone in the premises following the departure of the officers and their two prisoners until 8:10 p. m.

MR. GOULDEN: Q What happened at 8:10 p. m.?

MR. PERRY: I object to any testimony that this witness might give as to what happened at 8:10 p. m. on the ground that it will violate the constitutional rights of the defendant Rocchia, particularly as respects Amendments Four and Five to the Constitution.

THE COURT: Objection overruled.

MR. PERRY: Exception.

A I had started for what was Door No. 5, intending to go up and look over the mezzanine floor more carefully, and I heard footsteps out in front of the premises, and saw a sort of a shadow of a man's head and shoulders passing in front. I stopped in the middle of the room. The footsteps ceased in front of the small door. I then heard again the rattle of a key in the lock and I stepped under the stairs which led up to the mezzanine floor and concealed myself. I heard the small door open and close and then Door No. 5 was opened—it was not locked at that time; it was opened and I heard a man step down into this larger room. I stepped out from under the stairs and *throw* the beam of my flashlight in his face and told him that I was a federal officer and that he was under arrest. [119]



(Testimony of John M. Burt.)

(EXCEPTION NO. 22)

WITNESS (continuing): It was dark in this room at that time. It was not dark in the distillery at that time. It was all lighted up. I then placed the man who entered the premises at that time under arrest. I did not question him at that point. Immediately following placing the man under arrest I told him to go on back and he preceded me through doors 2 and 3 into the still room. This man was Antonio Rocchia, seated at the table there; the defendant on trial. I did not question the man when I reached the still room at this time. I did not search him when I first went into the still room.

MR. GOULDEN: Did you have any conversation with the defendant Rocchia when you went into the still room? A Yes, sir. Q What was that conversation?

MR. PERRY. I object to any conversation on the ground that it would be in violation of the constitutional rights of the defendant, particularly as respects the Fourth and Fifth Amendments.

THE COURT: Objection overruled.

MR. PERRY: Exception.

A Rocchia turned to me and said, "Are you really a federal officer?" I said, "I am," and I showed him my badge. He said, "Suppose I give you \$500 and you let me walk out and nobody will ever know the difference." I told him I would not

(Testimony of John M. Burt.)

take that offer. He then increased the offer to \$800. I refused that offer, I told him I would have to search him, which I then did. I found a wallet with a number of papers, various papers in it, and also a quantity of currency and a purse with a certain amount of currency in it, and some bills rolled up in his pocket, and a number of various other papers, and a key. At the time I [120] stated that he offered me first \$500 and then \$800, that was not the most that he offered me. He increased the offer later to \$1000 as I was making the search. When I was searching him he and I were alone. There was no one else present. I told him I was not interested. The exact words I do not recall, but as nearly as I can remember Rocchia said, "Suppose I make it \$1000?" When I refused that he said, "Isn't that enough?" And I again told him I was not interested. By that time I had segregated the papers from the purse out of his pocket and handed the wallet and the small purse back to him. He then said, "I think I have about \$1400, I am not sure how much I have, but I will give you all of it." He began to count the money out on the floor in the still room. When he completed the count he informed me there was \$1600, and offered me the lot of it. Q Less \$50? A The \$50 was in another purse. He did not count that out in the pile.

(EXCEPTION NO. 23)

WITNESS (continuing): In looking over the papers (taken from person of Rocchia, U. S. Ex-

(Testimony of John M. Burt.)

hibits in evidence numbers 7 and 8) I saw repeatedly the name Antonio Rocchia, and I asked him if that was his name and he said it was. He had not given me any name prior to the search. I Kept possession of the papers and the key that I found on his person. Government's Exhibit 4 for identification is the key that was on the person of the defendant Rocchia. It is his key because I scratched the initial "R" in the metal.

MR. GOULDEN: I ask, your Honor, that Government's Exhibit 4 for identification be now received in evidence.

THE COURT: It will be received and marked Government's Exhibit 6 in evidence.

MR. PERRY: I object to it on the ground that it violates [121] the constitutional rights of the defendant, particularly as respects Amendments Four and Five.

THE COURT: Objection overruled.

MR. PERRY: Exception.

(The key was marked "U. S. Exhibit 6.")

(EXCEPTION NO. 24)

WITNESS (continuing): I would recognize the papers that were seized from the defendant if I saw them again.

MR. GOULDEN: I show you three documents marked Government's Exhibit 5 for identification (U. S. No. 7 in evidence) purporting to be photographs of certain papers; also seven photographs

(Testimony of John M. Burt.)

marked government's Exhibit 6 for identification (U. S. No. 8 in evidence) and ask you if you ever saw them before, or the originals from which they might be taken?

MR. PERRY: I object to the question upon the ground that it violates the defendant's constitutional rights under the Fourth and Fifth Amendments; that a petition for the exclusion of evidence and return of property was filed and an order of court was made directing the return of the personal property. I object to this on the ground that the originals are the best evidence.

THE COURT: Objection overruled.

MR. PERRY: Exception.

THE COURT: Q In other words, you are not able to describe those documents accurately, are you? A Some I can describe accurately.

Q All the way through and as to language, etc.? A I could not reproduce every word on these documents.

Q In view of that, and looking at these photographs, do they depict the documents which you removed from the defendant? [122] A Yes, sir.

MR. PERRY: To the questions your Honor just asked, may I reserve an objection to them also?

THE COURT: Objection overruled.

MR. PERRY: Exception.

(EXCEPTION NO. 25)

WITNESS (continuing): I retained possession of the papers taken from the defendant Rocchia

(Testimony of John M. Burt.)

(U. S. Exhibits 5 and 6 for iden.) until along about the first part of February, I don't recall the exact date. Investigator Hauptman in my presence made photographs of these papers, developing negatives, and made the prints. To identify these documents I wrote my initials and the date on the back of each one. Investigator Hauptman also placed his initials thereon in my presence.

MR. GOULDEN: We ask that they be received in evidence as Government's Exhibits next in order.

THE COURT: Government's Exhibits 7 and 8.

MR. PERRY: I object to their introduction upon the ground that the originals are the best evidence; upon the ground that a complaint was filed before the United States Commissioner on January 10, 1933, charging this defendant with a violation of the National Prohibition Act, signed William P. Goggin; and a petition for the exclusion and suppression of evidence and the return of property was made and an order was made for the return of the personal property, signed by Judge Kerrigan, upon the dismissal of the case, which are referred to in Defendant's Exhibit 1 for identification. I object to it upon the ground that the receipt of these documents is prejudicial to the defendant and violates his constitutional rights, particularly as respects Amendments Four and Five. In respect to the objection [123] to the introduction of the photostatic copies in evidence, as a preliminary matter I wish at this time, for the purpose of

(Testimony of John M. Burt.) .

the record, to offer in evidence the documents I referred to, and particularly these documents which are now part of Defendant's Exhibit 1 for identification.

THE COURT: The order of admission will stand and the offer will be denied.

MR. PERRY: Exception.

WITNESS (continuing): Government's Exhibit No. 3 is the finger prints made by me of the defendant Rocchia on the night of January 9, 1933. This was signed by the defendant Rocchia, he placed the signature John Caruso thereon in my presence.

(EXCEPTION NO. 26)

AGENT BURT (continuing): I testified on cross-examination that Agents Goggin and De Kalb returned to the still room about 10 p. m. after they had left with the prisoners Ferrari and Cappi. I had a conversation with those agents when they returned; defendant Rocchia was present.

MR. GOULDEN: Q What conversation did you have, if any, with either of the agents Goggin or De Kalb upon their return?

MR. PERRY: For the purpose of preserving the record, I am going to make the same objection to this question, that is, the constitutional objection.

THE COURT: Objection overruled.

MR. PERRY: Exception.

A Investigator Goggin walked over in front of the defendant Rocchia, who was seated on a yeast



(Testimony of John M. Burt.)

box or on a five-gallon can and stopped in front of him and looked down and said, "Well, John, it looks as if you have the big shot." [124]

MR. GOULDEN: Q Who is John? A That is myself. Q Did you make any comment on that? A I said, "Yes, it looks as if I have, search him and see what you think."

(EXCEPTION No. 27)

WITNESS BURT (continuing):

MR. GOULDEN: Was there any further conversation either between yourself and the defendant or between yourself and the two agents with you in the presence of the defendant? A After the money had been counted and returned to the defendant Investigator Goggin turned to me and said——

MR. PERRY: Now, just a moment. I am sorry to interrupt but I think probably the line of answer would be along the line of the other testimony, and I wish to make this objection, that any statement that Goggin might make in the presence of this defendant is purely self-serving as far as the agents, themselves, are concerned. In fact, they could make any statement they pleased in the presence of any defendant, including this defendant, and then could take the stand and say they said such and such in front of a certain defendant, whereas as a matter of fact it is not binding upon the defendant at all, it is purely self-serving.

(Testimony of John M. Burt.)

MR. GOULDEN: The purpose of the question is to develop what the defendant did under the circumstances.

THE COURT: I will allow the question.

MR. PERRY: Exception.

A Investigator Goggin said, "Didn't he try to pay off?" And I said, "Yes, he did."

MR. GOULDEN: Q Did the defendant say anything to that? A He did not.

Q Was there any further conversation? A He was then ques- [125] tioned—in the presence of all of us and stated that he had been approached by a strange man down on Third street who had given him the key and told him if he would go up to 60 Brady street he might find some work, that he knew nothing about the still or its ownership. At that point he refused to answer any further questions. [126]

(EXCEPTION NO. 28)

TESTIMONY OF SAM McKEE, for the government.

SAM McKEE, called for the United States, being duly sworn, testified as follows:

I am in the real estate and insurance business at 2812 Mission street and have been in that business for twenty years. In the latter part of the year 1932 I had in my employ a man by the name of William Elligeroth. He acted as a real estate salesman, submitting properties and posting signs. I recognize Government's Exhibit

(Testimony of Sam McKee.)

8 for identification, dated the 10th day of November, 1932, being a lease between A. L. Thulin and Joseph Rossi. I was present when the lessor, Mr. Thulin, signed it. I was not present when Joseph Rossi signed it. I believe the name Joseph Rossi was on the lease at the time I saw it. I called on Mr. Thulin with my salesman, Mr. Elligeroth, and suggested that he lease the place under the conditions that were submitted to us. It was to be leased for a draying and express business. The place was unoccupied at the time and Mr. Thulin agreed to lease it under these conditions. After Mr. Thulin signed the lease I took it back. I left one copy with Mr. Thulin. We always have two or three copies. We have an owner's copy and a tenant's copy. This is the owner's copy; the copy I left with Mr. Thulin. I am familiar with the signature of Mr. Elligeroth. I would say that that was his signature as a witness on that lease.

#### CROSS EXAMINATION

WITNESS: I do not know the defendant Rocchia. I am not able to identify the defendant Rocchia. I don't think I have ever seen him before. He is not the man who was introduced [127] to me prior to the time the lease was signed and when the lease was being negotiated.

TESTIMONY OF AXEL L. THULIN, for the government.

AXEL L. THULIN, called for the United States, being duly sworn, testified as follows:

WITNESS: I reside at 656 16th Avenue, San Francisco. I am a general contractor. I own the premises at 60 Brady street, in the City and County of San Francisco. On or about November 10, 1932, I signed a lease of those premises. A salesman in Mr. McKee's office made the arrangements for the lease. At the time the lease was presented to me I am almost sure that it was signed by the proposed lessee. This is my signature on Government's Exhibit 8 for identification. (Later received as U. S. Exhibit #13 in evidence) I kept the lease in my possession following the signing of it. I signed two of them. I had it in my safe the day I handed it over to the prohibition agents. This was subsequent to the seizure of the still. I did not visit the premises at any time following November 10th when it was leased to whoever these parties were. I visited the premises on January 9, 1933, following the raid. I noticed that a *partition* had been put in. There were no structural changes except some broken glass in the skylight. A skylight or two was raised. I refer to the partition parallel with the front of the building and about thirty feet back. That is the wall marked 6 on government's exhibit No. 1 in evidence.

#### CROSS EXAMINATION

WITNESS: I never have seen the defendant Rocchia before today.

TESTIMONY OF HAROLD VON HUSEN, for the government.

HAROLD VON HUSEN, called for the United States, being duly [128] sworn, testified as follows:

WITNESS: I reside at 950 Pine street. I am an inspector in the San Francisco Water Department, and have been so employed for about twelve years. For three weeks in a month I am engaged in reading water meters, and the rest of the month I do inspection work. On January 4, 1933 I was at 60 Brady street, in San Francisco. I was reading water meters on Brady street. I found there was a very large delivery of water at 60 Brady street and that the meter was running wide open. I knocked on the door at the office and got no response. I looked inside but could see no one because of all the partitions there. I went to the garage door, the folding door, and pounded on that with my hook, but got no response. Then I went back to the meter and took another check on it and it was still running. I decided that the pipe must be broken in the building. I noticed there was a house valve in the meter box, which I shut off, and I left a note and put it under this door. I don't recall the exact time but I put the time on the letter.

MR. GOULDEN: Q I show you Government's Exhibit 8 (in evidence) and ask you if that is a true photo or copy of the note you left under the door?

MR. PERRY: I am going to object to the question upon the ground that any testimony which this witness might give with respect to Government's

(Testimony of Harold Von Husen.)

Exhibit 8 will violate the constitutional rights of the defendant on trial, particularly as respects amendments Four and Five. I repeat for the purpose of the record that a complaint was filed before the Commissioner charging the defendant with violating the National Prohibition Act in January of 1933 for the same offense for which he is being charged here now, arising out of the same transaction, and that a motion to [129] suppress was filed, and that the matter was dismissed, I mean the case was dismissed as to Rocchia; that an order in the District Court was signed ordering the return of all papers, and that those documents are contained in Defendant's Exhibit 1 for identification. The document that the witness now refers to is a photostatic copy, as I understand it from previous testimony, of certain papers that were taken from the defendant Rocchia's person.

THE COURT: The objection is overruled.

MR. PERRY: Exception.

A That is a true copy.

MR. GOULDEN: May I read this in evidence, your Honor?

THE COURT: You may.

MR. GOULDEN: "I have shut off your water at valve in water box. Meter running wide open. Pipe must be broken inside as water bill for month of Dec. will be over \$75.00. Would advise getting plumber and *called* at office 425 Mason street.



(Testimony of Harold Von Husen.)

Von Husen, Inspector S. F. Water Department.  
1/4/33 1:30 p.m.” No further questions.

CROSS EXAMINATION

WITNESS: I never have seen the defendant,  
Mr. Rocchia, before.

(EXCEPTION NO. 29)

TESTIMONY OF ERNEST E. WILLIAMS, for  
the government.

ERNEST E. WILLIAMS, called for the United  
States, being sworn, testified as follows:

WITNESS: I am United States *Commission*  
for this District at San Francisco. I was such on  
January 10, 1933. On that day I had a complaint  
No. 3142 filed before me charging Frank Ferrari and  
Silvio Cappi and John Caruso with conspiracy and  
manufacture. That complaint is now on file with the  
Clerk [130] of the United States District Court,  
here. Looking at Defendant's Exhibit 1 for iden-  
tification, I identify this as the complaint you are  
speaking about. Said Exhibit reading as follows:

“THE UNITED STATES OF AMERICA

No.— District of Calif, ss.

THE UNITED STATES

vs.

FRANK FERRARI, SILVIO CAPPI and  
JOHN CARUSO

COMPLAINT FOR VIOLATION OF SECTION  
NPA R. S.

Before me, the undersigned, a U. S. Commissioner for the No. Dist. of Calif., personally appeared this day Wm. P. Goggin, who, on oath, deposes and says that above Defendants, on or about the 9 day of Jan, 1933, at 60 Brady St. - S. F. in the north. District of Calif., did unlawfully,

Count 1. Conspire among themselves to violate the N. P. A., and in pursuance to said act said defendants did on above date possess a still; ~~and manufacture alcohol.~~

(E. E. W.) Count 1. manufacture alcohol contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And furthermore the said deponent says he has reason to believe and does believe that—————  
—————are material witnesses to the subject-matter of this complaint.

WM. P. GOGGIN

Subscribed and sworn to before me this 10 day of Jan., 1933

(Seal)

ERNEST E. WILLIAMS

U. S. Commissioner

WITNESS (continuing): There was a hearing on this complaint. I am of the opinion that there was a motion to suppress filed [131] before me. I have not the papers. They are in the clerk's office.

(Testimony of Ernest E. Williams.)

I would have to have the file to be able to say that there was a Motion to Suppress filed on behalf of the defendants in this case, particularly the defendant Caruso. I am of the opinion that there was. I have nothing in my docket to show it. My records show what the disposition of the case was by me; on January 28, 1932 I held the defendant Ferrari and I dismissed the other defendants, towit, Cappi and Caruso. I have in my docket that Mr. Abrams, who represented the Government at that time, consented to the dismissal of Caruso and Cappi. I have forgotten whether I decided a motion to suppress, but I would assume that I dismissed it upon the suggestion of Mr. Abrams, or, rather, dismissed them. I cannot say there was no motion to suppress presented to me. I have forgotten about that. I would say they were dismissed because Mr. Abrams moved to dismiss. I follow the policy of the United States Attorney, that is, if he suggests a dismissal I accept the suggestion. I would say there was no ruling by me on any motion to suppress so far as the defendant Caruso is concerned. I do not feel certain of my statement when I say that was my course of conduct in that case because I have had so many cases; I merely have in my docket that Abrams consented to the dismissal of Cappi and Caruso, which would indicate to me clearly that is the reason I dismissed them. I recollect signing an affidavit in which I set forth that I had not passed upon that matter. I signed a document entitled "Affidavit of Ernest E. Williams, United States Commissioner,"

(Testimony of Ernest E. Williams.)

Filed February 1, 1934, with the Clerk's office. I have read the affidavit and it is correct. The affidavit is to the effect that the motions to suppress were presented but no ruling was had upon them, at all. [132]

### CROSS EXAMINATION

WITNESS: This affidavit was sworn to by me on January 6, 1934. I don't know when the petition to suppress was filed. (Defendant's Exhibit No. 1 for identification) I have no record of that in my docket. I have no place there for such notation. The arrest took place on January 9, 1933, and the transcript of testimony taken on January 25, 1933 was taken before me as United States Commissioner. The matter was presented before me on January 25, 1933 and the *fuling* was made on January 28, 1933. On direct testimony I think I stated that my records would indicate there was no ruling on the motion to suppress because I have a notation here that Abrams the Assistant U. S. Attorney consented to the dismissal of Caruso and Cappi. There could have been a ruling on the motion to suppress by me even though the United States Attorney consented to their dismissal, but it would have been unnecessary. I would have indicated it had I made a ruling. I would have disposed of the entire matter so far as those particular issues were concerned, either by making a holding or a dismissal. The complaint before me now (Government's Exhibit 10 in evidence) does not charge a violation of any Internal

(Testimony of Ernest E. Williams.)

Revenue Act. It only charges a violation of the National Prohibition Act. Conspiracy in the first count and the second count is manufacturing alcohol. It is a complaint for violating the National Prohibition Act. I have independent recollection that this petition to suppress (Defendant's Exhibit No. 1 for identification) was filed before me; I am confident that it was.

MR. PERRY: I now offer the petition to suppress and to exclude evidence in evidence. (Defendant's Exhibit 1 for identification)

THE COURT: We have testimony here that that was never [133] acted upon and consequently it would not be a part of this case, so far as the Commissioner's testimony goes. The fact that it was filed in the case has no bearing here unless it was acted upon. Nobody has testified to that effect. It is part of Exhibit 1 for identification.

MR. PERRY: I will take an exception to your Honor's ruling. I offer at the same time again the order for the return of the property, signed by Judge Kerrigan in the same proceeding which is a part also of Defendant's Exhibit 1 for identification; I offer that in evidence.

THE COURT: The same ruling.

MR. PERRY: Exception.

#### RE DIRECT EXAMINATION

WITNESS WILLIAMS (continuing): It was my practice on violations of the law relating to the manufacture of liquor to charge it under the Na-

(Testimony of Ernest E. Williams.)

tional Prohibition Act during the time the National Prohibition Act was in effect. It is correct that there was a violation of the Revised Statutes as well as the National Prohibition Act. The notation N. P. A. was placed there by myself. No mention of the N. P. A. was made by the prohibition agents. "R. S." in the heading of the complaint stands for Revised Statutes. The internal Revenue Statutes are a part of the Revised Statutes.

THE COURT: The indictment here is presented by the grand jury. The offense for which the defendant is on trial is the offense set forth in these two indictments. The grand jury is not limited in his findings and holdings by the action of the Commissioner. The Commissioner simply holds the defendant over. The jury is only interested in the grand jury's action and the evidence which is received in this case. I don't think we have to go into these collateral matters. [134]

(EXCEPTION NO. 30)

TESTIMONY OF EMIL J. CANEPA, for the Government.

EMIL J. CANEPA, called for the United States, being duly sworn, testified as follows:

WITNESS: My name is Emil J. Canepa. I am a United States Deputy Marshal. I have been employed in that capacity for the last twelve years. I have acted as Italian Interpreter, both in court and out of court. I speak and write Italian. The



(Testimony of Emil J. Canepa.)

notation on the third sheet of U. S. Exhibit 7 which I now hold in my hand is in the Italian language. I have made a true and correct translation of that into the English language and the document which you now hand me is that true and correct translation. It is a complete translation with the exception of one thing, the "Fran." It appears here "dato al Fran \$40.00." It should be either "Frank" or it could be "Franchesca." It would be either an abbreviation for Frank or Franchesca." When I say "Frank" I do not mean a French coin or someone is frank and free. I mean the name of a person. At the bottom of the document is the word "Bal." with something following it; it is not clear. I can't make it out. I can't tell what it is. In this translation I have listed in columns as it is on the original the language used and to the right of that language I have placed the English translation.

MR. GOULDEN: I offer this translation in evidence and ask that it be marked Government's Exhibit next in order.

MR. PERRY: I object to it on the ground that it would have a tendency to and would violate the constitutional rights of this defendant, particularly as respects the Fourth and Fifth Amendments.

THE COURT: Objection overruled. It will be received as [135] Government's Exhibit 11 in evidence.

MR. PERRY: Exception.

(Testimony of Emil J. Canepa.)

Said Exhibit 11 in evidence reads as follows:

|               |                           |          |
|---------------|---------------------------|----------|
| “Zucchero     | \$277.10—Sugar            | \$277.10 |
| Yeast         | 55.00                     |          |
| Zucchero      | \$277.10—Sugar            | \$277.10 |
| Yeast         | 55.00                     |          |
| Zucchero      | \$277.10—Sugar            | \$277.10 |
| Yeast         | 55.00                     |          |
| Zucchero      | \$295.90—Sugar            | \$295.90 |
| Yeast         | 55.00                     |          |
| Zucchero      | \$295.90—Sugar            | \$295.90 |
| Yeast         | 55.00                     |          |
|               | 2104.00                   |          |
|               | 592.20                    |          |
|               | 2707.20                   |          |
| Rendita       | \$150.00—Rent             | \$150.00 |
| Carabinieri   | 300.00—Police             | \$300.00 |
| Canne         | 20.00—Cans                | \$20.80  |
| DATO al Fran  | \$40.00—Gave to Frank     | \$40.00  |
| Pagato Truck  | \$35.20—Paid Truck        | \$35.20  |
| Agua          | \$4.10—Water              | \$4.10   |
| Canne         | \$15.60—Cans              | \$15.60  |
| Tubs          | \$2.50—Tubs               | \$2.50   |
| Dato Al Carp. | \$25.00—Gave to Carpenter | \$25.00  |
|               | \$593.20                  |          |
|               | Bal. —————                |          |

January 5, \$163 “ [136]

### CROSS EXAMINATION

WITNESS CANEPA (continuing): There are several Italian dialects. I speak two or three of them, Genovese, Piemontese and Lucchese. I speak

(Testimony of Emil J. Canepa.)

primarily the Genovese dialect. There is nothing in the Exhibit I translated that I do not understand. It is in my own dialect.

(EXCEPTION NO. 31)

TESTIMONY OF GEORGE W. POULTNEY,  
for the Government.

GEORGE W. POULTNEY, called for the United States, being duly sworn, testified as follows:

WITNESS: I represent the New Amsterdam Casualty Company, and have for some time past, and did on November 25, 1933. On that date I wrote a New Amsterdam Casualty Company bond for Antonio Rocchia in the sum of \$2500 in case No. 24941, entitled In the United States District Court for this District, United States v. A. Rocchia. Mr. Rocchia signed that bond in my presence.

MR. PERRY: I concede that is his (Rocchia's) signature.

WITNESS: I know the defendant Antonio Rocchia. He is sitting there at the defense counsel's table.

THE COURT: Let the record show that the witness has identified the defendant Antonio Rocchia on trial.

MR. GOULDEN: I offer the bond in evidence as Government's Exhibit next in order for the purpose of being used as an exemplar.

THE COURT: It will be received as Government's Exhibit 12.

TESTIMONY OF EDWARD O. HEINRICH,  
for the government.

EDWARD O. HEINRICH, called for the United States, being [137] duly sworn, testified as follows:

WITNESS: I reside in Berkeley, California. I am an examiner of suspected and disputed writings and practice as a consulting criminologist in the field of physics and chemistry.

MR. PERRY: In the interest of time I am willing to stipulate to the qualifications of the witness to testify. I will stipulate that he is qualified to testify as an expert on handwriting and fingerprints.

WITNESS (continuing) Certain documents have been given to me in this case for my consideration and study. I am prepared to give my expert opinion as to the authorship of the handwriting contained in the documents I examined. I have seen government's Exhibit No. 12 purporting to be the bond in this case, government's Exhibit No. 3 (in evidence) being a finger print card of John Caruso, government's Exhibit No. 7 for identification, (Exhibit No. 14 in evidence) being a finger print card signed Antonio Rocchia dated October 11, 1930, and government's Exhibit No. 8 for identification, (Ex. No. 13 in evidence) a lease between A. L. Thulin and Joseph Rossi, and portions of Exhibit 7. I have examined the handwriting on each of these cards. Referring specifically to Government's Exhibit No. 8 for identification (U. S. Exhibit No. 13 in evidence) which is the lease, I

(Testimony of Edward O. Heinrich.)

have examined the signature of Joseph Rossi that appears upon that document. Also Government's Exhibit No. 12, (in evidence) the bond, I have examined the signature of Antonio Rocchia on that. Also Government's Exhibit No. 3 (in evidence) the finger print card containing the signature John Caruso; I examined the signature John Caruso and the finger prints on that document; also in connection with that latter document, Government Exhibit 3, I examined the finger prints. On Government's Exhibit No. 7 for identification (U. S. Exhibit No. 14 in evidence) being a [138] finger print card and signed Antonio Rocchia and dated October 1, 1930, I examined the signature Antonio Rocchia on that document, as well as the finger prints on that document. Another portion of U. S. Exhibit No. 7 in evidence, being a list of words and figures in two columns, I examined the handwriting of that portion of that exhibit. The handwriting on Government's Exhibit No. 3 (in evidence), as indicated by the signature John Caruso, was made by the same man who made the signature Antonio Rocchia appearing on the bond, Government's Exhibit No. 12 (in evidence). In my opinion both signatures or writings which have been drawn to my attention by the Assistant United States Attorney are, in my opinion, the writing of the same individual. They include the signatures John Caruso on Government's Exhibit No. 3 (in evidence), Antonio Rocchia, on the bond, Government's Exhibit No. 12 (in evidence), and the name Joseph Rossi on Government's

(Testimony of Edward O. Heinrich.)

Exhibit No. 8 for identification, the lease (U. S. Exhibit No. 13 in evidence), and the name Antonio Rocchia on Government's Exhibit No. 7 for identification (U. S. Exhibit No. 14 in evidence), and also the handwriting that is in Italian on Government's Exhibit No. 7; in evidence.

MR. GOULDEN: Q You have examined the finger print on the card, Government's Exhibit No. 3, (in evidence) have you, John Caruso? A Yes.

Q Have you also examined the finger print on the card Government's Exhibit No. 7 for identification, (U. S. Exhibit No. 14 in evidence) Antonio Rocchia? A Yes.

Q Are you prepared to say whether or not the finger prints are of the same man? A I am——

MR. PERRY: Just one moment, please. I am going to make an objection now, and I will make an objection later on; I am going to object to the further use of the finger prints. As I understood it, when these documents were introduced in evidence [139] first the only use of the documents was for the purpose of the handwriting. Now counsel for the Government endeavors to use by way of comparison the finger prints on those two cards, and by those two cards I mean Government's Exhibit No. 3 in evidence and Government's Exhibit No. 7 for identification (U. S. Exhibit No. 14 in evidence). I mention this at this time, your Honor, because they are trying to introduce or show prior transactions that this defendant may have had in other matters and to bring it in in this manner, and



(Testimony of Edward O. Heinrich.)

which could not have been brought into this court in any other way. In other words, by a subterfuge they are bringing in under the guise of the handwriting matter something to use against this defendant. I object to it on that ground and as a matter of principle.

THE COURT: It is certainly pertinent evidence and I will overrule the objection. Let us proceed with the examination.

MR. PERRY: Exception.

(EXCEPTION NO. 32)

MR. GOULDEN: Q Would you say at this time in your expert opinion that the finger prints on the two cards (U. S. Exhibit No. 3 in evidence and U. S. Exhibit No. 7 for identification (U. S. Exhibit No. 14 in evidence),) are one and the same man?

MR. PERRY: I object to it on the ground that the use of these documents is prejudicial so far as the defendant Rocchia [140] is concerned, and I assign the examination and the use of those documents with respect to finger prints by the United States Attorney as misconduct, and I ask your Honor to instruct the jury to disregard it.

THE COURT: The objection will be overruled.

MR. PERRY: Exception.

A They are the finger prints of one and the same individual.

(Government's Exhibit No. 8 for identification, the lease, was introduced in evidence and marked U. S. Exhibit 13.)

(Testimony of Edward O. Heinrich.)

(EXCEPTION NO. 33)

CROSS EXAMINATION

WITNESS HEINRICH: In comparing the signature Joseph Rossi on Government's Exhibit No. 13 in evidence with any documents or exemplars I may have had, the basis of my comparison was not only the signature Rocchia. I had other signatures but they were the signatures of Rocchia. With the exception of government's exhibit 7 in evidence there was no other writing than signatures.

Q Was Exhibit 7 used as an exemplar, or was it used for the purpose of determining whether or not Rocchia's writing was on that document?

A Primarily, it was identified as being probably in Rocchia's handwriting. From the signatures I identified it as his handwriting, and therefore used it to some extent as a guide in considering the other evidence.

THE COURT: As I understand it, you were not interested *in* alone in taking a signature that somebody told you was Rocchia's but you compared all these writings to establish in your mind that the same individual, whoever he might be, actually wrote these various writings? A That is the way the problem was [141] handled. That was the real problem so far as I was concerned. I don't know Mr. Rocchia. I never saw him write. Consequently it is by other testimony that someone must establish that some of those signatures are his signatures.

(Testimony of Edward O. Heinrich.)

The foundation of the examination was a signature. I did not have any other writings as the foundation or basis for my expert opinion. It was only told to me that that might be Rocchia's handwriting on Government's Exhibit 7 in evidence. When they submitted all these documents they were variously described. U. S. Exhibit No. 7 was described as an exemplar with a reservation that it had not been fully identified; that is the way it was presented to me. I included it in one of my exemplars with that reservation until after I had established my basis on the comparison of signatures, and thereafter I considered it with relation to the signature.

Q In other words, you could take any one of those writings as an exemplar and by comparing it with the other writings you would be of the opinion that all the writings were by the same person; is not that correct, or have you a doubt as to any of those writings?

A No, I have no doubt as to any of the writings but if the exemplars are withdrawn one by one until I am reduced to just the bond, which is Exhibit No. 12 (in evidence), and the lease, which is Exhibit No. 13 (in evidence), I would have to qualify my answer somewhat, but having before me Government's Exhibit 7 for identification (U. S. Exhibit No. 14 in evidence) bearing the signature Antonio Rocchia and the bond (U. S. Exhibit No. 12 in evidence) bearing the signature Antonio Rocchia, and Government's Exhibit No. 3 (in evidence) bearing the signature John Caruso, there is

(Testimony of Edward O. Heinrich.)

enough material in those four signatures to positively establish the identification, and from that to proceed to any other writing by the same person. [142]

MR. PERRY Q Taking Government's Exhibit No. 13 in evidence, what are the dissimilar features to all the exemplars, taking each word?

A When you include the exemplars as a group the dissimilarities are reduced *partially* to zero. If you select, for instance, that which seems to be farthest away, the bond, Government's Exhibit No. 13, and the signature Joseph Rossi on Government's Exhibit 12, then we are comparing writing which differs in size and differs in the presence of certain letters. Joseph Rossi and Antonio Rocchia have in common only the letter "o" and the letter "i." In the case of Government's Exhibit No. 12 the erroneous writing of "c" following "o" in the name Rossi—it is written "R-o-c," and a correction appearing therein correcting it and concluding it as Rossi. The name as it was written was begun, "R-o-c," exactly as it is in Rocchia. Those are the similar features. As to the dissimilar features the presence in the name Joseph Rossi, the "J," the small letter "s" and the small letter "e." The small letter "h" occurs in Joseph and in Rocchia as a common feature. I have enumerated them in so far as these letters occur which are common to the two names. They are not dissimilar in their construction or their formation, their slope or their style; they are dissimilar only in size. They retain, in spite of

(Testimony of Edward O. Heinrich.)

the difference in size, the same proportion and the same procedure in their production. The dissimilarities, if we may call them dissimilarities, are only those dissimilarities which involve the presence of other letters—letters which are not common to the two names.

MR. GOULDEN: I neglected or I overlooked requesting that Government's Exhibit No. 7 for identification be admitted in evi- [143] dence. Professor Heinrich identified it, that being the finger print card with the signature Antonio Rocchia upon it.

THE COURT: Then this will be received as U. S. Exhibit 14 in evidence.

MR. PERRY: I object to it as immaterial, irrelevant, and incompetent, and upon the ground that it is prejudicial to the rights and interests of my client to introduce this document in evidence bearing his purported finger prints and his signature; it violates the constitutional rights of the defendant, particularly as respects the Fourth and Fifth amendments.

THE COURT: Ruling will stand.

MR. PERRY: Exception.

(EXCEPTION NO. 34)

MR. GOULDEN: The Government rests.

MR. PERRY: The defendant rests, we have no evidence to present. I would like to make certain motions to your Honor.

THE COURT: Proceed with the motions, Mr. Perry, prior to argument.

MR. PERRY: I wish at this time to make a motion for a directed verdict. The motion for directed verdict goes first to indictment No. 24941-L. The grounds of my motion are as follows:

That the facts and allegations set forth in indictment No. 24941 do not constitute an offense against the laws of the United States because the allegations contained in counts 1, 2, 3, 4, 5, 6, and 7, and each of them, and with respect to them separately and severally, do not constitute an offense against the laws of the United States.

Furthermore, on the ground that because in the trial of the [144] case the evidence adduced on all counts and on each count, separately and severally, of indictment No. 24941-L, showed that the discovery of the commission of the crime, if any, was secured by unlawful search and seizure, and in violation of the rights guaranteed to the defendant by the Fourth and Fifth Amendments to the Constitution of the United States, by reason whereof this Court has no jurisdiction to hear and determine said cause, or any part thereof.

On the further ground because the indictment in each count, separately and severally, is vague, uncertain, and indefinite, and does not sufficiently state or aver or set forth the alleged offense charged in said counts and each of them against said defendant, or the acts or facts constituting the same



so as to apprise said defendant of the crime or the offense with which he therein stands charged.

On the further ground because the evidence introduced as to indictment No. 24941-L, and as to each count of said indictment, separately and severally, was insufficient to support a charge under the indictment.

Furthermore, because of error in admitting evidence as to any offense under indictment 24941-L, as to each count thereof, separately and severally.

Further, upon the ground that there was admitted incompetent evidence offered by the United States.

Further, that the Court erred upon the trial of said cause in deciding questions of law arising during the course of the trial, which errors were duly excepted to.

As a further ground, the misconduct of the United States Attorney, which was duly and regularly assigned during the course of the trial and exceptions to which were taken. [145]

THE COURT: The motion will be denied.

MR. PERRY: Exception to the denial of the motion for a directed verdict.

(EXCEPTION NO. 35)

Thereupon the matter was argued to the jury by respective counsel and the jury was instructed by the court as follows:

CHARGE TO THE JURY.

THE COURT (Orally): You are here, gentlemen of the jury, for the purpose of trying the

issues of fact that are presented by the allegations in the indictment herein returned by the federal grand jury of this division and district, and filed in this court, and the defendant's plea thereto.

The indictment herein is, and is to be considered, as a mere charge or accusation against the defendant, and is not, of itself, any evidence of the defendant's guilt, and no juror in this case should permit himself to be to any extent influenced against the defendant because or on account of such indictment, and/or the arrest of a defendant under such indictments.

The duty of trying the issues of fact herein you should perform uninfluenced by pity for the defendant, or by passion or prejudice on account of the nature of the charge against him; nor should you reach a verdict based upon mere suspicion. You are to be governed solely by the evidence introduced in this trial, and the law as given you by this Court.

The law will not permit jurors to be governed by mere sentiment, conjecture, sympathy, passion or prejudice. A verdict founded upon sentiment or pity for the accused, or upon public opinion or public feeling, or upon passion or prejudice, or upon conjecture, would be a false verdict. You will not [146] take counsel of them in deliberating upon your verdict.

In determining the issues of fact herein, the matter of the penalty prescribed by law for the punishment of the offense involved should form no part of your deliberations, and should you be aware

of any such penalty it is your duty to disregard such knowledge; in other words, it is your sole duty to decide whether the defendant is guilty or not guilty of what he is charged within the indictment herein. The question of punishment is left wholly to the Court, except as the law circumscribes its power.

The Court cautions you to distinguish carefully between the facts testified to by the witnesses and the statements made by the attorneys in their arguments, as to what facts have been proved. And if there is a variance between the two you must, in arriving at your verdict, to the extent that there is such variance, consider only the facts testified to by the witnesses; and you are to remember that statements of counsel in their arguments are not evidence in the case.

If counsel, upon either side, have made any statements in your presence concerning the facts of the case, you must be careful not to regard such statements as evidence, and must look entirely to the proof in ascertaining what the facts are.

If counsel, however, has stipulated or agreed to certain facts, you are to regard the facts as stipulated to as being conclusively proven.

It sometimes happens during the trial of a case that objections are made to questions asked, or to offers made to prove certain facts, which objections are sustained by the Court; and it sometimes happens that evidence given by a witness is stricken out by the Court on motion. In any of such cases you are [147] instructed that in arriving at a verdict

you are not to consider as evidence anything that has been stricken out by the Court, or anything offered to be proven or contained in any question to which an objection has been sustained by the Court.

The Court charges you that evidence admitted for a limited purpose is to be considered by the jury for such purpose, and none other. Under this rule, it is the duty of the jury, when the propositions of fact to which such evidence is addressed are determined, to exclude such evidence from their minds as to all other matters of fact in the case.

The jury are the sole and exclusive judges of the effect and value of evidence addressed to them, and of the credibility of the witnesses who have testified in the case, and the character of the witnesses as shown by the evidence should be taken into consideration for the purpose of determining their credibility and the fact as to whether they have spoken the truth. And the jury may scrutinize not only the manner of witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified; his interest in the case, if any; or his bias or prejudice, if any, against one or any of the parties; by the character of his testimony; or by evidence affecting his character for truth, honesty, or integrity; or by contradictory evidence; and the jury are the exclusive judges of his credibility.

A witness false in one of his or her testimony is to be distrusted in others, that is to say, the

jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; and the jury being con- [148] vinced that a witness has stated what was untrue, not as the result of mistake or inadvertence, but wilfully and with the design to deceive, must treat all of his or her testimony with distrust and suspicion, and reject all, unless they shall be convinced, notwithstanding the base character of the witness, that he or she has in other particulars sworn to the truth.

A defendant in a criminal action is presumed to be innocent until the contrary is proved. And in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to an acquittal.

Reasonable doubt is not mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. The burden of proof is upon the prosecution. All the presumptions of law, independent of evidence, are in favor of innocence, and every person is presumed to be innocent until he is proven guilty. If, upon such proof, there is a reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true than



the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty—a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it. [149] While the defendant cannot be convicted unless his guilt is established beyond a reasonable doubt, still the law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind.

The jury are not bound to decide in conformity with the declarations of any number of witnesses who do not produce conviction in their minds against a less number or against a presumption or other evidence satisfying their minds.

There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony of an eye witness to the commission of the crime, and the other is proof in testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant, and which is known as circumstantial evidence. Such evidence may consist of statements by defendants, plans laid for the commission of the crime; in short, any acts, declarations, or circumstances admitted in evidence tending to connect the defendant with the commission of the crime. There is nothing in the nature of cir-



cumstantial evidence that renders it less reliable than the other class of evidence. A man may as well swear falsely to an absolute knowledge of the facts as to a number of facts from which, if true, the facts on which the guilt or innocence depends must inevitably follow.

If, upon consideration of the whole case, you are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendant, you should so find, irrespective [150] of whether such certainty has been produced by direct evidence, or by circumstantial evidence. The law makes no distinction between circumstantial and direct evidence in the degree of proof required for conviction, but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both.

The defendant is entitled, if he so elects, to rest the issues of the case upon the testimony presented by the prosecution, without offering any evidence in his defense. A defendant is not required to take the witness stand to establish his innocence, and no presumption or inference should be indulged in against a defendant because of his failure to take the stand and testify.

I charge you that in order to convict this defendant the facts proven must be consistent with the hypothesis of his guilt, and inconsistent with the hypothesis of his innocence. I further instruct you that any such hypothesis must not only be rational, that is, based upon reason, but founded upon and limited within the evidence presented in the case,

and not upon any guess or groundless surmise, nor mere conjecture or idle supposition, irrespective of such evidence.

The jury is instructed that the opinion of a handwriting expert is subject to the same general rules applicable to the testimony of other witnesses in determining the weight to be given his testimony. You should consider in this behalf the bias and interest of the expert, the fact that he is being paid to testify by the party producing him, in this case by the United States of America. You are not bound to accept or follow the testimony of an expert witness. The evidence of handwriting experts is not binding upon you, but it is received as advisory [151] only. You are therefore permitted to regard such evidence as advisory only and reckon with it in the light and experience of human affairs and accept it or reject it in whole or in part as you see fit.

I might state in that connection, gentlemen, that there were a number of exhibits which were placed in evidence which were not displayed to the jury. I do not know why that was not done, or whether it was just an oversight. In determining the issues in this case, if you desire to see them yourselves and view these exhibits I suggest that you ask for them when you go to your deliberations if you want to view them.

The first indictment involving seven counts is one that is predicated upon the Internal Revenue Acts passed for the purpose of obtaining government regulation and also obtaining revenue for the Gov-

ernment. The suggestion regarding this issue has been presented in a sort of an argumentative way, and I notice that I had to go out of my way, on account of the unusual argument of the counsel to find out just what he meant, and whether he conceded that the law of the United States has been violated. Of course, you could hardly follow the Christian doctrine of "Go and sin no more," because no man would be convicted of any offense if you had that in mind. You have taken an oath to follow the laws of the United States and to determine the facts under the instructions which are being given to you. The question is, Did this defendant violate the law of the land? In passing I would say this: Of course, the Revenue Act, which is involved here in the first six counts of this indictment, is an Act that was on the statute books long before prohibition was considered in a legislative way by the Federal Government. At the time of the enactment of the Prohibition Law it was thought [152] that possibly the Prohibition Act had in some way impaired the force or effect of these statutes, and they were re-enacted, as it were, at the same time and in association with the Prohibition Act. But it was the same law that existed before. To-day it stands, although the Prohibition Laws have passed away and cease to be of effect or moment in the law of the land. It is a regulation of distilleries with the idea of deriving revenue from that regulation, as well as conserving or controlling that activity.

The first count of Indictment No. 24941 in substance charges that on or about the 9th day of

January 1933, the defendant had in his possession an unregistered still set up, in violation of the Revised Statutes, Section 3258, which, in general, provides that every person having in his possession or custody, or under his control, any still set up which has not been properly registered with the Collector of the District is guilty of an offense.

I wish to state in general regarding these six charges representing the first six counts of this indictment that the rule of the Government is, regarding registration of these other factors, that such fact of registry is peculiarly within the knowledge of a defendant, and if in truth and in fact he has a registered still, one authorized by the Government and regulated under the rules of the Government, he would be in a position to show that to the jury in his defense. Therefore, the burden is placed upon the defendant in a case where there are these requirements, as to whether he has given notice, or whether he has been issued a bond, etc., to show, if he desired in his defense to contend that it was a registered still following the law, and consequently there could have been no criminal action taken [153] against him.

The second count in substance charges that on or about the same day the defendant was engaged in the business of a distiller of alcohol without first having given the required notice, in violation of the Revised statutes, Section 3259, which in general provides that every person engaged in or intending to be engaged in the business of a distiller, and who fails to give notice in writing to the Collector of

the District stating his name and residence, and if a company or firm the name and residence of each member thereof, as well as other required statistical data, shall be guilty of an offense.

The instruction which I just gave pertains to all these; in other words, you might sum it up this way, that a defendant who has not registered a still in conformity with the law with the Collector of Internal Revenue for the District, or who has not obtained a permit for a distillery, it is incumbent upon him if his defense is that he has taken those various steps, to make that showing.

The third count, in substance, charges that on or about the same day the defendant commenced the business of a distiller of alcohol and wilfully failed to give a bond, in violation of Revised Statutes 3260, which, in general, provides that every person intending to commence or to continue the business of a distiller, and who before proceeding with such business fails to file a bond conditioned that he shall faithfully comply with all provisions of the law relating to the business of distillers is guilty of an offense.

The fourth count charges that on or about the same day the defendant engaged in the business of a distiller of alcohol with intent to defraud the United States of the tax on distilled [154] spirits, in violation of Revised Statutes, Section 3281, which in general provides that every person who engages in or carries on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him is guilty of an offense.



In this case the testimony has been that this alcohol was found and there were no revenue stamps upon it and no evidence was produced to show that any payment was ever made upon the alcohol which was seized by the agents in this case.

The fifth count charges in substance that on or about the same day the defendant made and fermented mash fit for distillation and the production of alcohol other than in a duly authorized distillery, in violation of Revised Statutes 3282, which, in general, provides that every person who shall make or ferment mash, wort, or wash fit for distillation, or for the production of the spirits of alcohol, in any building or on any premises other than a distillery authorized by law, is guilty of an offense.

The sixth count, in substance, charges that on or about the same day the defendant, not being an authorized distiller, knowingly *spearated* by distillation alcoholic spirits from fermented mash, in violation of the Revised Statutes, Section 3282, already mentioned, which also in general provides that any person other than an authorized distiller who shall, by distillation or by any other process, separate alcoholic spirits from fermented mash, wort or wash is guilty of an offense.

The seventh count in this indictment charges conspiracy; in other words, under the United States Laws it is not only an offense to commit those things which are prohibited by law but it is an offense to conspire to defeat those laws. It is a [155] separate and distinct offense with a separate and distinct punishment. I might state that in the production



of evidence here I think it is possible, although I have not reviewed the record, that the Court indicated that it was incumbent upon the defendant to produce certain documents which had been returned to him if application was made by the Government for their production. That is the civil law but not the criminal law. If I did so state in the record I erred. I want you to understand that the defendant is not compelled to produce anything against himself, even if demand is made upon him in a criminal action. In your consideration bear that in mind, that the defendant is not required or expected, nor can you assume anything against him because he has not produced, if he has them—there is nothing to establish that he has them at the present time—any documents which might have been desired by the Government to be produced, if they did so desire to have them produced.

The seventh count of this indictment is brought under Section 37 of the Criminal Code, which reads: If two or more persons conspire either to commit an offense against the United States or to defraud the United States in any manner, or for any purpose, and one or more such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished, if convicted, as in the statute provided. This defendant is not charged in this count of the indictment with a violation of any of the revenue acts or prohibition acts, or any other acts as far as the substantive law is concerned; the specific charge against him is that he entered into an agreement to do those things

specified in there with others, and that in furtherance of that agreement one or more of those who were in the conspiracy performed some of the acts for the pur- [156] pose of accomplishing it. The first essential inquiry for your consideration is whether there *esisted* the offense charged, since if a conspiracy has not been shown the defendant must be acquitted, no matter what acts he may have committed to violate the National Prohibition Act or the Revenue Act, or any other law which is involved in this particular issue.

If you find there was a conspiracy you will then determine whether or not the defendant on trial was a party thereto. If you find there was such conspiracy and the defendant was a party thereto you will then determine whether or not some of the overt acts alleged were committed by some party to the conspiracy. An overt act is any act such as those alleged in this indictment, done by one or more of the parties to the conspiracy to effect its object. The term "overt act" simply means an open, positive acts susceptible of proof. The overt acts set forth here in the indictment are as follows: There are three overt acts:

"(1) That on or about the 8th day of November, 1932, the defendant Antonio Rocchia visited the realty firm of Sam McKee & Company, 2812 Mission Street, in the City and County of San Francisco, State of California, and negotiated for a lease of the premises located at No. 60 Brady Street, in the City and County of San Francisco, State of California;

“(2) That on or about the 8th day of November, 1932, the defendant Antonio Rocchia in company with an employee of the realty firm of Sam McKee & Company visited those certain premises located at No. 60 Brady Street, San Francisco, California;

“(3) That on or about the 10th day of November, 1932, the defendant Antonio Rocchia, executed, under the name of Joseph Rossi, lessor, a lease in writing for the premises at No. 60 Brady Street, City and County of San Francisco, State of California, [157] for the period of one year, with the owner, A. L. Thulin, in the presence of a representative of Sam McKee & Company, and paid the sum of \$450; \$150 of which being the first month's rent, and the balance being security for last two months rental, under the terms of said lease.”

It is important at the outset that you should have a clear conception of what constitutes a crime under this section and of the evidence necessary to establish it. I therefore repeat the statute. It provides that if two or more persons conspire to commit an offense against the United States and one or more of such parties do any act to effect the object of the conspiracy each of the parties thereto shall be guilty of a crime. You will observe that there are three essential elements necessary to constitute a crime under the statute. First, there must be the act of two or more persons conspiring and confederating together; one person cannot conspire with himself. I might state in this connection, though, it is true that while this is so there is no reason why any one conspirator cannot be *trued* without

the other conspirators being tried at the same time; in other words, it is not essential that any more than one conspirator be on trial before you, but it must be shown that there was a conspiracy. It must appear that the purpose of the conspiracy was to commit an act or offense against the United States, that is, to violate some law of the United States, and that one or more conspirators, after the conspiracy has been formed and during its existence, must do some act to effect the object thereof. Each of these elements is an essential ingredient to the crime charged, and must be established to your satisfaction and beyond a reasonable doubt before you can find a verdict of guilty; but if each of these elements is [158] established then the crime of conspiracy is complete, regardless of the fact whether its purpose was accomplished or not. By way of illustration, and illustration only, if two persons should enter into an agreement or conspiracy to violate, we will say, the former Prohibition Law by the possession of and dealing in intoxicating liquors, and one of such persons in pursuance of that agreement, and during its existence, should rent a room and fit it up for the purpose of engaging in this business, the conspiracy would be complete and they would be guilty of conspiracy, although as a matter of fact they never possessed any intoxicating liquor or sold any. So it is important that you keep in mind, in a case of this character, it is not the substantive offense this defendant is charged with violating in the seventh count of the indictment, but a conspiracy or agreement to

commit that offense, and the performance of some act in furtherance of that agreement.

There is nothing obscure or difficult to understand in the term "conspiracy" as used in the statute and in this indictment. Whenever two or more persons act together understandingly to do an unlawful act there is a conspiracy, although there may not have been a definite word, either written or spoken, between them regarding it. Therefore, in the present case if you find that there was an agreement or understanding among the defendant and other persons, or some of them, whether named in the indictment, or not, to accomplish the purpose charged, then you may find that they conspired to commit an offense against the United States as charged in the indictment. It is not material when or where the conspiracy was formed, so long as it existed when the effort was made to carry it out. Information of the criminal purpose should precede the doing of the overt acts, but the [159] latter may be considered in determining whether they were done in pursuance of a conspiracy or not.

The formation or existence of a conspiracy may be shown either by direct and positive evidence or by circumstantial evidence. The law does not require the prosecution to lay its finger on the precise method or manner in which such a conspiracy of the kind here alleged was entered into, if the facts deduced show that such an agreement did exist among the defendants to do the acts charged, because it would be impossible, in the great majority



of cases, for the Government to undertake such proof. The very word conveys the idea of secrecy. Conferences are nearly always held in secret and declarations and agreements are made only in the presence of the conspirators. The fact of a conspiracy almost always must be established more or less circumstantially.

Anyone who after a conspiracy has been formed, with knowledge of its existence, joins therein and aids in its execution, from that time on becomes as much a party thereto as if he had been an original conspirator. Mere knowledge of the existence of a conspiracy without active participation therein is not sufficient to warrant the conviction of any defendant. It is characteristic of the crime of conspiracy that acts done by any one of the conspirators while engaged in the effectuation of the object of the conspiracy are deemed to be the acts and admissions of all and are alike binding on all. *No* so if acts or admissions are done previous to entering into the conspiracy or after the same has been dissolved or the parties thereto have ceased their cooperation; in such case the acts and admissions are binding only on the one acting or speaking.

In this case the Court admitted testimony as to the acts [160] of alleged conspirators who have been arrested. It is the opinion of the Court at this time that that particular testimony should not have been admitted. It is a very close question. The whole issue comes in this case upon whether the conspiracy was terminated by the arrest, at the moment of the arrest. I believe it would be the more



liberal and proper view, and therefore I so instruct you, that where the arrest was made in these cases—where these people were arrested—their statements were taken as against the conspiracy charged to exist, that you shall set those things aside and not consider them in connection with weighing the issues to determine the conspiracy charged.

Where certain overt acts are alleged to have been committed by defendant for the purpose of effecting the object of the conspiracy, that is, carrying it into effect, these overt acts, while essential to be charged and shown are nevertheless no part of the object of the conspiracy. Overt acts, which simply means open and manifest acts which may be established by proof, were acts intended to aid the conspirators in effecting and carrying out the purpose of their alleged unlawful plan and conspiracy. These acts, themselves, need not necessarily be criminal in their nature. They may be as innocent as a man walking across the street to speak to another, but if that act is done as part of the purpose to effect the conspiracy it is criminal to the extent that it enters into making up and effecting the conspiracy under our law. It is not necessary that all the overt acts charged be proved, but it is necessary that at least one of these be proved and that it be shown to have been in furtherance of the object of the conspiracy. Other overt acts than those charged may be given in evidence, but proof of one of those charged in the indictment is indispensable. [161]

Upon the question of intent upon the part of a defendant you are instructed that the law presumes

that every person intends the natural and ordinary consequences of his acts. Wrongful acts knowingly or intentionally committed cannot be justified on the ground of innocent intent. Ordinarily the intent with which a man does a criminal act is not proclaimed by him, and ordinarily there is no direct evidence upon which the jury may be satisfied, from declarations of the person himself, as to what he intended when he did a certain act.

While a conspiracy cannot exist without a guilty intent being there present in the minds of the conspirators, yet this does not mean that they must know that they are violating the statutes or any statute of the United States. The only question for you to pass upon in this connection is whether the defendants conspired to do the things which were in violation of law, not whether they had knowledge that they were violating the law. And this question, like all other questions of fact, is solely for you to determine from the evidence in the case.

There need not even be previous acquaintance, nor is it essential that each conspirator should know the exact part or parts to be performed by the other or others in execution of the conspiracy; in other words, it is sufficient if two or more persons, with knowledge of what they are doing, by their acts and conduct cooperate and work together and in unison in pursuance of a common design or purpose for the obvious effectuation or consummation of a common object, if that object be criminal in character or unlawful, and this whether or not there was at any time an assembling of the parties or specific understanding between or among them.

I will now read to you Section 332 of our Criminal Code, [162] which is as follows:

“Who are *principles*. Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission is a principal.”

For one person to abet another person in the commission of a criminal offense simply means to knowingly and with criminal intent aid, promote, encourage or instigate by act or counsel, or by both act and counsel, the commission of such criminal offense. If you believe that the defendant had under his control the management of the premises in which the still was found, and knowing it was there made no effort to remove it, he is guilty as a principal. If the defendant knowingly permitted property leased by him, such as the building, sub-basement, wall, or other portion of said property, to be used in whole or in part, or supplied labor or material to be used in connection with an illicit still, and he did so knowingly, then the defendant so acting is *builty* as a principal.

You are instructed that prohibition agents are persons acting for the United States in an official function and their proposed conduct, even in matters which they cannot finally determine, constitutes action on matters before them in their official capacity, or which may be in violation of their lawful duty as specified in the provision I have just read you. [163]

Now, gentlemen, on retiring to the jury room it is necessary for you to bring in a verdict on each of the seven counts in the first indictment. In reaching a verdict it will be necessary that it be the verdict of the jury and also of each and every member thereof. Your first duty will be to elect a foreman and then proceed to your deliberations. When you have reached a verdict it will be signed by your foreman and returned here in open court.

Is there anything further before the jurors retire? If not the jury will retire.

A JUROR: Your Honor, may we have the exhibits that you mentioned?

THE COURT: Have you any objection to all the exhibits being submitted to the jury?

MR. GOULDEN: The Government has no objection.

MR. PERRY: No objection, your Honor. [164]

THE COURT. You may now retire, gentlemen, in charge of an officer.

(Thereupon the jury retired to deliberate upon their verdict; whereupon they returned into court and returned a verdict of guilty upon Counts 1, 2, 3, 4, 5 and 6 and disagree as to Count 7 of indictment No. 24941-L.

Thereupon the Court ordered the sentence and judgment of said Antonio Rocchia continued to June 30, 1934.)

AND BE IT FURTHER REMEMBERED, That thereafter, upon arraignment for judgment, the

defendant presented and filed a motion for new trial in words and figures following, towit:

[Title of Court and Cause.]

“MOTION FOR A NEW TRIAL

“Comes now ANTONIO ROCCHIA, defendant in the above entitled action, by Messrs. George J. Hatfield and Frank J. Perry, his attorneys, and moves the court to set aside the verdict rendered herein and to grant a new trial in said cause and for reasons therefor shows to the court the following:”

“1. That the verdict in said cause is contrary to law.

“2. That the verdict in said cause is contrary to the evidence. [165]

“3. That said evidence in the case was not sufficient to justify said verdict.

“4. The court, to the substantial prejudice of the defendant, erred in decisions of questions of law arising during the course of the trial.

“5. The Court, to the substantial prejudice of the defendant, admitted incompetent, irrelevant and immaterial evidence against the defendant.

“6. The court, to the substantial prejudice of the defendant, erred in denying the motion of the defendant for a directed verdict made at the close of the evidence in chief of the Government.

“7. The Court, to the substantial prejudice of the defendant, erred in denying the motion of the defendant for a directed verdict made at the close of all the evidence in the case.

“8. The United States Attorney, during the course of the trial, was guilty of misconduct that was gravely and substantially prejudicial to the rights of the defendant.

“9. The Court, during the course of the trial, was guilty of misconduct that was gravely and substantially prejudicial to the rights of the defendant.

“10. The Court erred in admitting evidence procured in violation of the rights guaranteed to the defendant by the Constitution of the United States.

“This motion is directed to counts 1, 2, 3, 4, 5, and 6 of the indictment separately and severally and the verdict rendered thereon, and it is made upon all the statutory grounds and the reasons for which new trials have been granted in the [166] Courts of the United States.

“Respectfully submitted,

GEO. J. HATFIELD  
FRANK J. PERRY  
Attorneys for defendant

Dated: June 30, 1934

“Receipt of a copy of the foregoing MOTION FOR A NEW TRIAL is hereby admitted this 30th day of June 1934.

H. H. McPIKE  
United States Attorney

THOS. G. GOULDEN  
Asst. U. S. Atty.”

The motion for new trial was denied by the Court, to which ruling the defendant excepted.



(EXCEPTION NO. 36)

Thereupon the defendant presented and filed a Motion in Arrest of Judgment in words and figures following, towit:

[Title of Court and Cause.]

“MOTION IN ARREST OF JUDGMENT

“Now comes the defendant, ANTONIO ROCCIA, by his attorneys, Messrs. Geo. J. Hatfield and Frank J. Perry, in the above entitled cause, and moves the court to arrest judgment on each and every count in the indictment herein upon which the defendant was convicted, towit: Nos. 1, 2, 3, 4, 5, and 6, on the 27th day of June 1934, for the following reasons:

“1. That any judgment made and entered would be unlawful.

“2. That the facts and allegations therein stated do not constitute an offense against the laws and statutes of the United States.

“3. That the facts and allegations therein stated in counts 1, 2, 3, 4, 5, and 6, and each of them, separately and [167] severally, of said indictment, do not constitute an offense against the laws and statutes of the United States.

“4. That on the trial of said cause the evidence adduced on each of said counts separately and severally of the indictment therein showed that the discovery of the commission of the crime if any was secured by unlawful search and seizure in violation of the rights guaranteed to the defendant

by the Fourth and Fifth Amendments to the Constitution of the United States by reason whereof this court has no jurisdiction to hear and determine said cause or any part thereof.

“5. That the indictment and each count thereof separately and severally is vague, uncertain and indefinite and does not sufficiently state or aver or set forth the alleged offenses charged in said counts against said defendant, or the acts or facts constituting the same, to have apprised said defendant of the crime or offense with which he therein stood charged.

“6. Because the evidence introduced was insufficient to sustain the verdict rendered herein as to each count of the indictment.

“7. Misconduct of counsel for the Government that prevented the defendant from having a fair and impartial trial by the jury and gravely and substantially prejudiced the rights of the defendant therein.

“8. Misconduct of the Court that prevented the defendant from having a fair and impartial trial by the jury and gravely and substantially prejudiced the rights of the defendant therein.

“9. That the verdict is contrary to law.

“10. That the verdict in said cause was not supported by the evidence in the case. [168]

“11. That the Court erred upon the trial in said cause in deciding questions of law arising during the course of said trial, which errors were duly excepted to.

“12. That the Court upon the trial of said cause admitted incompetent, irrelevant and immaterial evidence offered by the United States of America.

“WHEREFORE, defendant moves the court to arrest the judgment against him and hold for naught the verdict rendered against him in said cause on counts numbered 1, 2, 3, 4, 5, and 6, of the indictment, separately and severally.

Dated : June 30, 1934.

GEO. J. HATFIELD  
FRANK J. PERRY  
Attorneys for Defendant

“Receipt of a copy of the above and foregoing MOTION IN ARREST OF JUDGMENT is hereby admitted this 30th day of June 1934.

H. H. McPIKE  
United States Attorney

THOS. G. GOULDEN  
Asst. U. S. Atty.”

The Court denied the Motion in Arrest of Judgment, to which ruling the defendant excepted. [169]

(EXCEPTION NO. 37)

Thereupon the Court imposed judgment and sentence upon the defendant as follows:

On the first count, eighteen months in the Federal Penitentiary, a fine of \$100, a penalty of \$500.

On the second count, a fine of \$100 and a penalty of \$1000.

On the third count, a fine of \$500 and eighteen months in the Federal Penitentiary.

On the fourth count, a fine of \$100 and eighteen months in the Federal Penitentiary.

On the fifth count, a fine of \$500 and eighteen months in the Federal Penitentiary.

On the sixth count, a fine of \$500 and eighteen months in the Federal Penitentiary.

The penitentiary sentences will run concurrently, so that it will all amount to an imprisonment for eighteen months.

MR. PERRY: Exception.

That the following form of stipulation and order extending term of court was duly signed by Honorable Harold Louderback the trial Judge of said cause and attorneys for the respective parties in the manner set forth in said stipulation and order, and that the date each stipulation and order was signed, filed and time extended are as follows:

[Title of Court and Cause.]

“STIPULATION AND ORDER EXTENDING  
TERM OF COURT

IT IS HEREBY STIPULATED that for the purpose of serving and lodging proposed amendments to proposed bill of exceptions of the above named defendant duly served and lodged and on [170] file herein, and for the purpose of having the bill of exceptions herein settled and allowed and of making any and all motions in connection therewith, together with taking and perfecting any and all other necessary steps in connection with the appeal of said defendant herein, the term of the above entitled court shall be and hereby is extended

to and including the \_\_\_\_\_ day of \_\_\_\_\_ 193—.

Dated: San Francisco, California, \_\_\_\_\_ 193—.

H. H. McPIKE

United States Attorney

Attorney for Plaintiff

GEO. J. HATFIELD

FRANK J. PERRY

Attorneys for defendant

IT IS SO ORDERED

HAROLD LOUDERBACK

Judge of the United States District Court

That the first stipulation and order was duly signed September 24, 1934 and filed with the Clerk of said Court on September 26, 1934, and the term of said court was duly extended to and including November 1, 1934.

That the second stipulation and order was duly signed October 31, 1934 and filed with the Clerk of said Court on October 31, 1934, and the term of said court was duly extended to and including December 1, 1934.

That the third stipulation and order was duly signed November 13, 1934 and filed with the Clerk of said Court on November 14, 1934, and the term of said court was duly extended to and including December 31, 1934. [171]

That the fourth stipulation and order was duly signed December 28, 1934 and filed with the Clerk of said Court on December 29, 1934, and the term of said court was duly extended to and including January 11, 1935.

That the fifth stipulation and order was duly signed January 9, 1935 and filed with the Clerk of said Court on January 10, 1935, and the term of said court was duly extended to and including January 21, 1935.

That the sixth stipulation and order was duly signed January 18, 1935 and filed with the Clerk of said Court on January 21, 1935, and the term of said court was duly extended to and including January 31, 1935.

That the seventh stipulation and order was duly signed January 28, 1935 and filed with the Clerk of said Court on January 28, 1935, and the term of said court was duly extended to and including February 10, 1935.

That the eighth stipulation and order was duly signed February 7, 1935 and filed with the Clerk of said Court on February 9, 1935, and the term of said court was duly extended to and including February 20, 1935.

That the ninth stipulation and order was duly signed February 18, 1935 and filed with the Clerk of said Court on February 20, 1935, and the term of said court was duly extended to and including March 2, 1935.

That the tenth stipulation and order was duly signed February 27, 1935 and filed with the Clerk of said Court on March 1, 1935, and the term of said court was duly extended to and including March 17, 1935. [172]

That the eleventh stipulation and order was duly signed March 15, 1935 and filed with the Clerk of



said Court on March 16, 1935, and the term of said court was duly extended to and including March 27, 1935.

That the twelfth stipulation and order was duly signed March 25, 1935 and filed with the Clerk of said Court on March 27, 1935, and the term of said court was duly extended to and including April 13, 1935.

That on July 3, 1934, said trial judge, Honorable Harold Louderback duly signed an order allowing appeal in the above entitled action and on July 7, 1934 the proposed bill of exceptions and notice of presentation to said trial judge was duly lodged on Honorable H. H. McPike, the United States Attorney, Attorney for Plaintiff with due admission of service by said United States Attorney endorsed thereon and on July 9, 1934 said proposed bill of exceptions was filed with the Clerk of said United States District Court, Northern District of California, Southern Division. [173]

That the following form of order and stipulation extending time for serving and lodging proposed amendments to the bill of exceptions was duly signed by Honorable Harold Louderback, the trial judge of said cause, and the attorneys for the respective parties in the manner set forth in said order and stipulation except that in the first order and stipulation, as hereinafter noted, said order was duly signed by Honorable A. F. St. Sure, United States District Judge in and for said Division and District, by reason of the fact that said Honorable Harold Louderback was not accessible, and that

the date each such order and stipulation was duly signed, filed and time extended are as follows:

[Title of Court and Cause.]

ORDER EXTENDING TIME FOR LODGING  
PROPOSED BILL OF EXCEPTIONS IN  
THE ABOVE ENTITLED ACTION.

IT IS HEREBY ORDERED that the time for serving and lodging proposed amendments to the bill of exceptions in the above entitled action is hereby extended to and including the——day of \_\_\_\_\_ 193—.

Dated: \_\_\_\_\_193—.

HAROLD LOUDERBACK  
United States District Judge

SO STIPULATED:

H. H. McPIKE

United States Attorney  
Attorney for Plaintiff

GEO. J. HATFIELD

FRANK J. PERRY

Attorneys for Defendant [174]

That the first order and stipulation were duly signed on July 16, 1934, and duly filed with the Clerk of said court on July 16, 1934, and said time was duly extended to and including August 7, 1934.

That the second order and stipulation were duly signed on August 2, 1934, and duly filed with the Clerk of said court on August 3, 1934, and said time was duly extended to and including September 10, 1934.

That the third order and stipulation were duly signed on August 27, 1934, and duly filed with the Clerk of said court on August 29, 1934, and said time was duly extended to and including October 15, 1934.

That the fourth order and stipulation were duly signed on October 11, 1934, and duly filed with the Clerk of said court on October 12, 1934, and said time was duly extended to and including December 1, 1934.

That the fifth order and stipulation were duly signed on November 13, 1934, and duly filed with the Clerk of said court on November 14, 1934, and said time was duly extended to and including December 31, 1934.

That the sixth order and stipulation were duly signed December 28, 1934, and duly filed with the Clerk of said court December 29, 1934, and said time was duly extended to and including January 11, 1935.

That the seventh order and stipulation were duly signed January 9, 1935, and duly filed with the Clerk of said court January 10, 1935, and said time was duly extended to and including January 21, 1935.

That the eighth order and stipulation were duly signed January 21, 1935, and duly filed with the Clerk of said court [175] January 21, 1935, and said time was duly extended to and including January 31, 1935.

That the ninth order and stipulation were duly signed January 28, 1935, and duly filed with the

Clerk of said court January 28, 1935, and said time was duly extended to and including February 10, 1935.

That the tenth order and stipulation were duly signed February 7, 1935, and duly filed with the Clerk of said court February 9, 1935, and said time was duly extended to and including February 20, 1935.

That the eleventh order and stipulation were duly signed February 18, 1935, and duly filed with the Clerk of said court February 20, 1935, and said time was duly extended to and including March 2, 1935.

That the twelfth order and stipulation were duly signed February 27, 1935, and duly filed with the Clerk of said court March 1, 1935, and said time was duly extended to and including March 17, 1935.

That the thirteenth order and stipulation were duly signed on March 15, 1935, and duly filed with the Clerk of said court March 16, 1935, and said time was duly extended to and including March 27, 1935. [176]

[Title of Court and Cause.]

#### STIPULATION RE BILL OF EXCEPTIONS

It is hereby stipulated by and between the parties to the above entitled action, by their respective counsel, that the foregoing bill of exceptions is in all respects complete and contains all the evidence, oral and documentary, except such documentary evidence as may be duly certified and authenticated

by the Clerk of the above entitled Court and transmitted and filed with the clerk of the Circuit Court of Appeals, and all the proceedings relating to preliminary motions, trial, conviction, motion for directed verdict, motion for new trial, and motion in arrest of judgment of the defendant, including all stipulations and orders filed herein, omitting only title of court and cause, extending term of court, and time of lodging proposed amendments to bill of exceptions; and the same may be settled and allowed as such by the above entitled Court; that the exhibits referred to therein (U. S. Exhibits Nos. 1, 2, 3, 7, 8, 12, 13 and 14) may be duly certified and authenticated by the Clerk of the above entitled court and when transmitted to and filed with the clerk of the Circuit Court of Appeals may be deemed a part of said bill of exceptions and may be referred to by the parties hereto and by said United States Circuit Court of Appeals as fully as though included herein.

Dated: San Francisco, California, March 27, 1935.

H. H. McPIKE

United States Attorney

THOS. G. GOULDEN

Assistant United States Attorney

GEO. J. HATFIELD

FRANK J. PERRY

Attorneys for Defendant [177]

[Title of Court and Cause.]

ORDER SETTLING AND ALLOWING BILL  
OF EXCEPTIONS.

Pursuant to said stipulation, the foregoing bill of exceptions is hereby settled, allowed and authenticated as and for the appellant's bill of exceptions for use on appeal in the above entitled action within time allowed by rule and the foregoing orders of the Court and that the same contains all the evidence oral and documentary introduced at the trial of said cause except such documentary evidence as may be duly certified and authenticated by the Clerk of the above entitled Court and transmitted and filed with the Clerk of the Circuit Court of Appeals.

It is further ordered, that exhibits in the above entitled action referred to in said bill of exceptions (U. S. Exhibits Nos. 1, 2, 3, 7, 8, 12, 13 and 14) may be withdrawn and when duly certified and authenticated by the Clerk of this Court, may be transferred to the Clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit, to become a part of the record on appeal, and when so transmitted to the said United States Circuit Court of Appeals, may be referred to by the parties hereto and by said court as a part of said bill of exceptions.

Dated: San Francisco, March 27, 1935.

HAROLD LOUDERBACK  
United States District Judge

[Endorsed]: Filed Mar 28 1935 [178]



[Title of Court and Cause.]

### SUPERSEDEAS RECOGNIZANCE

KNOW ALL MEN BY THESE PRESENTS, That we, ANTONIO ROCCHIA, as Principal, and EARL S. DOUGLASS, RAY S. ROSSITTER and A. GIANNONE, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Ten Thousand (\$10,000.00) Dollars, for the payment of which to the said United States of America well and truly to be made, we and each of us do hereby bind ourselves, our successors, personal representatives, and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 16th day of October A. D. 1934.

WHEREAS lately, at a session of the United States District Court for the Northern District of California, Southern Division, in a suit pending in said Court, at San Francisco, California, between the United States of America as complainant and Antonio Rocchia, as defendant, a Judgment was rendered against said Antonio Rocchia, defendant, on the 30th day of June, 1934, sentencing said Antonio Rocchia to be imprisoned for a term of— ON FIRST COUNT OF INDICTMENT to be imprisoned for Eighteen (18) months, pay a fine of One Hundred (\$100.00) Dollars, and pay a penalty of Five Hundred (\$500.00) Dollars; ON SECOND COUNT to be imprisoned for Eighteen (18) months, pay a fine of One Hundred (\$100.00) Dollars, and pay a penalty of One Thousand (\$1,000.00) Dollars; ON THIRD COUNT to be imprisoned for Eighteen

(18) months, and pay a fine of Five Hundred (\$500.00) Dollars; ON FOURTH COUNT to be imprisoned for Eighteen months and pay a fine of One Hundred (\$100.00) Dollars; [179] ON FIFTH COUNT to be imprisoned for Eighteen (18) Months and pay a fine of Five Hundred (\$500.00) Dollars; ON SIXTH COUNT to be imprisoned for Eighteen (18) months and pay a fine of Five Hundred (\$500.00) Dollars. Ordered said terms of imprisonment commence and run concurrently, such imprisonment to be in a United States Penitentiary to be designated by the Attorney General of the United States. Further ordered that if default in payment of fines defendant be further imprisoned until said fines be paid or defendant be otherwise discharged in due course of law, and the said defendant Antonio Rocchia having filed his petition for and obtained order allowing his appeal in the Clerk's Office of said Court to reverse the Judgment in the aforesaid suit, and a citation directed to the United States of America, citing and admonishing it to appear at the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California; and whereas the said Antonio Rocchia desires said appeal to operate as a supersedeas and stay of execution and to be admitted to bail and to be permitted to be and remain at large on bail pending said proceedings on appeal to the said United States Circuit Court of Appeals for the Ninth Circuit;

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the said Antonio Rocchia shall prosecute his appeal to effect, and if

he fails to make his plea good, shall answer and pay all damages and costs and shall also personally be and appear here in this court from day to day during the present term and from term to term of this Court thereafter, pending said proceedings on appeal, and shall surrender himself to the United States Marshal of this District and be present to abide the Judgment of this Court or that of the United States Circuit Court of Appeals in and for the Ninth Circuit and serve his sentence, and not depart the jurisdiction of this Court without leave thereof, then this obligation to be [180] void; otherwise to remain in full force and virtue.

This recognizance shall be deemed and construed to contain the "Express agreement" for summary judgment, and execution thereon, mentioned in Rule 34 of the District Court.

ANTONIO ROCCHIA  
EARL S. DOUGLASS  
RAY S. ROSSITTER  
A. GIANNONE

Subscribed and sworn to before me and acknowledged before me and approved as to Principal and Sureties this 16th day of October, 1934.

[Seal]

ERNEST E. WILLIAMS  
United States Commissioner  
No. Dist. of Calif. [181]

United States of America  
Northern District of California—ss.

EARL S. DOUGLASS, whose name is subscribed to the foregoing undertaking as one of the sureties

thereof, being first duly sworn, deposes and says:

That I am a householder in said district and reside at No. ——— Street, in the City of Menlo Park, State of California, and by occupation Broker.

That I am worth the sum of Ten Thousand \$10,000.00) Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution, and that my property, now standing of record in my name, consists in part as follows:

Real estate, consisting of Seats on San Francisco Stock and Curb Exchange worth \$20,000.00. Interest Howell, Brayton Douglas Co. worth \$25000.00.

That the encumbrances on the foregoing property are as follows: Clear

.....

(List mortgages, trust deeds, etc.)

That my total net assets, above all liabilities and obligations on other bonds, is the sum of over \$50,000.00.

That I am not surety upon outstanding penal bonds, now in force, aggregating total penalty \$————.

[Seal]

EARL S. DOUGLASS

Subscribed and sworn to before me this 16th day of October, A. D. 1934.

[Seal]

ERNEST E. WILLIAMS

United States Commissioner  
For the Northern District  
of California. [182]

United States of America

Northern District of California—ss.

RAY S. ROSSITTER, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says:

That I am a householder in said district and reside at No. 49 Cerritos Street, in the City of San Francisco State of California, and by occupation Broker.

That I am worth the sum of Ten Thousand (\$10,000.00) Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution, and that my property, now standing of record in my name, consists in part as follows:

Real estate, consisting of Interest in 49 Cerritos worth \$15000.00; Secured accounts receivable worth \$60,000.00;

That the encumbrances on the foregoing property are as follows: \$8000.00 against 49 Cerritos;

.....  
(List mortgages, trust deeds, etc.)

That my total net assets, above all liabilities and obligations on other bonds, is the sum of over \$25,000.00.

That I am not surety upon outstanding penal bonds, now in force, aggregating total *penalty* \$.....

(Seal)

RAY S. ROSSITTER

Subscribed and sworn to before me this 16th day of October, A. D. 1934.

(Seal)

ERNEST E. WILLIAMS

United States Commissioner  
For the Northern District  
of California. [183]

United States of America

Northern District of California—ss.

A. GIANNONE, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says:

That I am a householder in said district and reside at No. 2055 Turk Street, in the City of San Francisco, State of California, and by occupation Laborer.

That I am worth the sum of Ten Thousand (\$10,000.00) Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution, and that my property, now standing of record in my name, consists in part as follows:

Real estate, consisting of 2055 Turk (2 flats & garage—) garage at 2053 Turk worth \$13000.00

That the encumbrances on the foregoing property are as follows: \$15,000.00.

.....

(List mortgages, trust deeds, etc.)

That my total net assets, above all liabilities and obligations on other bonds, is the sum of \$.....

That I am not surety upon outstanding penal



bonds, now in force aggregating total penalty  
\$. . . . .

That I am single.

(Seal)

A. GIANNONE

Subscribed and sworn to before me this 16 day  
of October, A. D. 1934.

(Seal)

ERNEST E. WILLIAMS  
United States Commissioner  
For the Northern District of California

—

October 17, 1934 Approved as to form:

H. H. McPIKE  
United States Attorney  
By THOS. G. GOULDEN  
Asst. U. S. Attorney [184]

[Endorsed] Approved  
Harold Louderback  
U. S. District Court Judge.

FILED OCT 18, 1934  
Walter B. Maling, Clerk. [185]

IN THE SOUTHERN DIVISION OF THE  
UNITED STATES DISTRICT COURT,  
IN AND FOR THE  
NORTHERN DISTRICT OF CALIFORNIA.

No. 24941-L

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTONIO ROCCHIA,

Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of said Court:

Sir: Please prepare transcript on petition for appeal to the United States Circuit Court of Appeal for the Ninth Circuit to be composed of the following papers:

1. Indictment #34941-L.
2. Arraignment.
3. Plea.
4. Verdict.
5. Minute order of June 27, 1934, continuing judgment.
6. Judgment.
7. Petition for allowance of appeal.
8. Order allowing appeal.
9. Citation on appeal.
10. Assignment of Errors.
11. Bill of Exceptions.
12. U. S. Exhibits Nos. 1, 2, 3, 7, 8, 12, 13 and 14.

13. Supersedeas Recognizance.

14. Praecipe.

Dated: San Francisco, California, March 27th,  
1933.

Respectfully requested,

GEO. J. HATFIELD

FRANK J. PERRY

Attorneys for Defendant

[Endorsed]: Filed Mar 27 1935 [186]

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[Title of Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

District Court of the United States  
Northern District of California—ss.

I, WALTER B. MALING, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 186 pages, numbered from 1 to 186, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of UNITED STATES OF AMERICA vs. ANTONIO ROCCHIA, No. 24941-L, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Thirty Three Dollars and Fifteen cents (\$33.15) and that the said amount has

been paid to me by the Attorneys for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 10th day of April A. D. 1935.

(Seal)

WALTER B. MALING  
Clerk.

By C. M. TAYLOR,  
Deputy Clerk. [187]

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[Title of Court and Cause.]

CITATION ON APPEAL

United States of America, ss:

THE PRESIDENT OF THE UNITED STATES  
OF AMERICA

To UNITED STATES OF AMERICA and to H.  
H. McPIKE, United States Attorney, North-  
ern District of California, greeting:

YOU ARE HEREBY CITED AND ADMON-  
ISHED to be and appear at a United States Circuit  
Court of Appeals for the Ninth Circuit, to be holden  
at the City of San Francisco, in the State of Cali-  
fornia, within thirty days from the date hereof,  
pursuant to an order allowing an appeal, of record  
in the Clerk's Office of the United States District  
Court for the Northern District of California,  
Southern Division, wherein ANTONIO ROCCHIA,  
defendant, is appellant, and you are appellee, to  
show cause, if any there be, why the decree or judg-

ment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable HAROLD LOUDERBACK, United States District Judge for the Northern District of California, this 6th day of July, A. D. 1934.

HAROLD LOUDERBACK

United States District Judge. [188]

Due service and receipt of copy of within Citation on Appeal hereby admitted this 7th day of July, 1934.

H. H. McPIKE

U. S. Atty.

By R. B. McMILLAN

Asst. U. S. Atty.

[Endorsed]: Filed Jul 9 1934 3:01 p. m.

WALTER B. MALING

Clerk.

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[Endorsed]: Transcript of Record. Filed April 10, 1935, Paul P. O'Brien, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

